TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~44~~ 140

KATE APPLEGATE, WILLIAM APPLEGATE, HARRIET B. CLARK, CHARLOTTE HOLLINGSWORTH, MARTHA O. CLARK, AND JAMES CLARK, PLAINTIFFS IN ERROR,

vs.

THE LEXINGTON AND CARTER COUNTY MINING COMPANY, THE NORTON IRON WORKS, THE EASTERN KENTUCKY RAILWAY COMPANY, W. W. CULBERTSON, THOMAS W. MEANS, AND K. R. CULBERTSON, PARTNERS AS CULBERTSON, MEANS AND CULBERTSON, CHARLES CONNOR, JOHN BAYSE AND SAMUEL T. MOORE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED OCTOBER 19, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 414.

KATE APPLEGATE, WILLIAM APPLEGATE, HARRIET B. CLARK, CHARLOTTE HOLLINGSWORTH, MARTHA O. CLARK, AND JAMES CLARK, PLAINTIFFS IN ERROR,

vs.

THE LEXINGTON AND CARTER COUNTY MINING COMPANY, THE NORTON IRON WORKS, THE EASTERN KENTUCKY RAILWAY COMPANY, W. W. CULBERTSON, THOMAS W. MEANS, AND K. R. CULBERTSON, PARTNERS AS CULBERTSON, MEANS AND CULBERTSON, CHARLES CONNOR, JOHN BAYSE AND SAMUEL T. MOORE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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a UNITED STATES OF AMERICA, *District of Kentucky,* } *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the Kentucky district, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Kate Applegate, Wm. Applegate, Harriet B. Clark, Charlotte Hollingsworth, Martha O. Clark, and James Clark, plaintiffs, and The Lexington and Carter County Mining Company, The Norton Iron Works, The Eastern Kentucky Railway Company, W. W. Culbertson, Thomas W. Means, and K. R. Culbertson, partners, as Culbertson, Means and Culbertson; Charles Corum, John Boyse & Samuel T. Moore, defendants, a manifest error hath happened, to the great damage of the said Kate Applegate and the other plaintiffs aforesaid, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first day of our next October term in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said Court, at Covington, in said district, this eighteenth day of July, A. D. 1882, and of the Independence of the United States the 106th year.

[SEAL.]

JOS. C. FRUNELL,
C. C. C., K. D.,
By J. G. HAMILTON, *D. C.*

Allowed by—

STANLEY MATTHEWS,
Associate Justice.

Executed by delivering a true copy of the within writ to J. G. Hamilton, deputy clerk, for Jos. C. Frunell, clerk of the U. S. circuit court for the district of Kentucky, at Covington, this the 5th day of August, 1882.

A. J. AUXIER,
U. S. Marshal,
By S. H. PARKER,
D. U. S. Marshal.

b UNITED STATES OF AMERICA, } *ss*:
District of Kentucky, }

To The Lexington and Carter County Mining Company, The Norton Iron Works, The Eastern Kentucky Railway Company, W. W. Culbertson, Thomas W. Means, & K. R. Culbertson, partners, as Culbertson, Means & Culbertson; Charles Corum, John Boyse, & Samuel T. Moore, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington city on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the said district of Kentucky, wherein Kate Applegate, William Applegate, Harriet B. Clark, Charlotte Hollingsworth, Martha O. Clark, and James Clark are plaint'ffs and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this eighteenth day of July, in the year of our Lord 1882, and of our Independence the 106th.

STANLEY MATTHEWS,
Associate Justice.

c Executed upon The Lexington & Carter County Mining —, The Norton Iron Works, The Eastern Kentucky Railway Company, Charles Corum, John Boyse, and Samuel Moore, parties named in the within citation, by delivering to Edward F. Dulin, attorney for the above-named parties, a true copy of the within citation, this the 10th day of August, 1882.

A. J. AUXIER,
U. S. Marshal.
By S. H. PARKER,
Deputy U. S. Marshal.

Executed upon Culbertson, Means and Culbertson, parties named in the within citation, by delivering to W. H. Wadsworth, their attorney, a true copy hereof, this the 8th day of August, 1882.

A. J. AUXIER,
U. S. Marshal,
By S. H. PARKER,
D. U. S. Marshal.

(Endorsed:) Supreme Court U. S., 1882. October term. No. 1108. Kate Applegate & *al.* pl'ffs in err., *vs.* The Lexington & Carter Co. Mining Co. Citation. Filed ——.

d Circuit Court of the United States, District of Kentucky.

KATE APPLEGATE and others
vs.
THE LEXINGTON AND CARTER COUNTY MINING COMPANY and others.

Know all men by these presents that I, W. E. Applegate, am held

and firmly bound unto The Lexington & Carter County Mining Company & the other defendants herein in the sum of six hundred dollars, to be paid to the said Lexington & Carter County Mining Company & the other defendants herein, their assigns, successors, executors, or administrators; to which payment, well and truly to be made we bind ourselves and each of us, jointly and severally, and our, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this eighteenth day of July, A. D. 1882.

Whereas the above-named Kate Applegate and the other plaintiffs herein have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Covington:

Now, therefore, the condition of this obligation is such that if the above-named Kate Applegate and the other plaintiffs herein shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

W. E. APPLEGATE, [L. S.]
By N. T. CRUTCHFIELD, [L. S.]
Att'y-in-Fact.

Approved: STANLEY MATTHEWS.
July 18, 1882.

Sealed and delivered in presence of—
J. G. HAMILTON, *D. C.*,
For JOE C. FINNELL,
Clerk U. S. C. C.

(Endorsed:) Filed July 18, 1882. Jos. C. Finnell, C. C. C., K. D., by J. G. Hamilton, D. C.

e Know all men by these presents that I, William E. Applegate, of the city of Louisville, State of Kentucky, have made, constituted, and appointed, and do hereby make, constitute, and appoint, N. T. Crutchfield and D. W. Armstrong, of the city of Louisville, State of Kentucky, or either of them, my true and lawful attorneys or attorney, for me, and in my name, place, and stead, to execute and sign for and in behalf of the plaintiffs such bond or bonds as may be necessary or required for the purpose of and in order to the prosecution of a writ of error to the Supreme Court of the United States from the judgment of the circuit court of the United States for the district of Kentucky, (sitting at Covington), in the case of Kate Applegate and others, plaintiffs, against The Lexington and Carter County Mining Company and others, defendants, which judgment was rendered on the —— day of August, 1880, hereby granting to said attorneys or either of them full power and authority in the premises, and hereby ratifying and confirming

all that said attorneys may lawfully do or cause to be done
f by virtue hereof.

In testimony whereof, I have hereunto set my hand this —— day of May, 1882.

W. E. APPLEGATE.

STATE OF KENTUCKY, *County of Jefferson,* } *sct:*

Personally appeared before me, —— ——, a notary public for the county and State aforesaid, and acknowledged the within and foregoing power of attorney to be his act and deed on this the — day of May, 1882.

Given under my hand and official seal.

g W. E. Applegate being duly sworn, says on his oath that he is the person whose name is signed to the foregoing power of attorney; that the said name was so signed by this affiant, and is his genuine and proper signature.

Affiant further says that he has property in the State of Kentucky, subject to execution, over and above the amount of his debts, of the value of six hundred dollars.

W. E. APPLEGATE.

STATE OF KENTUCKY, *County of Jefferson:*

This day appeared before me, a notary public in and for Jefferson county, W. E. Applegate, who, being duly sworn, says the statements of the foregoing affidavits are true.

This 17th day of May, 1882.

[SEAL.] GUY C. SIBLEY,
Notary Public, Jefferson County, Kentucky.

[Endorsed:] W. E. Applegate. Power of attorney to N. T. Crutchfield & D. W. Armstrong. Filed July 18, 1882. Jo. C. Frunell, C. U. S. C. C., by I. G. Hamilton, D. C.

1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Covington, on Monday, May 10th, A. D. 1880, and of our Independence the 104th year.

Present: Honorable John W. Barr, judge of the United States for the district of Kentucky.

KATE APPLEGATE *et al. vs.* LEX. & CARTER CO. R. R., &c.

Be it remembered that heretofore, to wit, on the 27th day of November, A. D. 1877, came the defendants, by E. F. Dulin, Esq., their attorney, and filed in the clerk's office of our said court transcript of proceedings had in the United States circuit court at Louisville.

Which said transcript is in the words and figures following, to wit:

Proceedings of the circuit court of the United States for the Kentucky district, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, October 1st, 1877.

2 Present: Hon. Bland Ballard, judge of the United States for the Kentucky district.

KATE APPLEGATE *et al. vs.* LEX. & CARTER CO. R. R., &c.

Be it remembered that heretofore, to wit, on the 20th day of July, 1877, came the plaintiffs, by D. W. Armstrong, their attorney, and filed in the clerk's office of said court their petition against the defendants, which is hereto attached, marked "A."

Upon which petition summons issued, and was returned by the marshal, which is hereto attached, marked "B."

And on the 28th day of August, 1877, *alias* process issued, and was returned by the marshal, which is hereto attached, marked "C."

On the 27th day of August, 1877, an order of survey was entered in the clerk's office, which is endorsed on the petition, as required by the code of practice, and is marked "D."

And at a term of our said court held for its October term, 1877, to wit, on Monday, October 1st, 1877, came the plaintiffs, by D. W. Armstrong, their attorney, and on their motion it is ordered

3 that this action as to the defendants, Polly Montgomery, Reuben Ward, Charles Spangler, and William H. Wadsworth be, and the same is hereby, dismissed without prejudice.

Came also the defendants, The Lexington & Carter County Mining Company, The Eastern Kentucky Railway Company, Charles Corum, John Bays, and Samuel T. Moore, The Norton Iron Works, by Ed. F. Dulin, their attorney, and filed their answers herein.

Came also Charles Corum, by same attorney, and filed his petition to be made a defendant herein. The defendants also filed two agreements herein.

Said answers, petition, and agreements above referred to are hereto attached, marked, respectively, E, F, G, H, J, K, L, and M.

And, on motion of the defendants, by their said attorney, it is ordered that this case be, and the same is hereby, transferred for trial to our circuit court, sitting at Covington.

DISTRICT OF KENTUCKY:

I, Sam'l B. Crail, clerk of the circuit court of the United States for the Kentucky district, at Louisville, do certify that the foregoing is a true copy of the orders and proceedings had in the court in the case mentioned in the caption hereof, and that the papers

4 herewith, marked A, B, C, D, E, F, G, H, J, K, L, and M, are the original papers in said case.

Witness my hand and the seal of said court at Louisville, this 26th day of November, 1877.

[SEAL.] SAM'L B. CRAIL, *Clerk.*

The petition above referred to, marked "A," is in the words and figures following, viz:

Petition.

In the Circuit Court of the United States for the District of Kentucky. In the 6th Circuit.

KATE APPLEGATE, WILLIAM APPLEGATE, HARRIET B. CLARK, CHARLOTTE HOLLINGSWORTH, MARTHA A. CLARK, and JAMES CLARK, Plaintiffs,

vs.

THE LEXINGTON AND CARTER COUNTY RAILROAD AND MINING COMPANY, The Norton Iron Works Company, The Buena Vista Furnace Company, The Hunnewell Furnace Company, Allen Carroway, Joseph Morris, Polly Montgomery, Reuben Ward, Charles Spangler, Robert Wright, Henry Carroway, Samuel Moore, John Boyce, Mrs. — Carroway, James Carroway, Moses Adams, W. H. Wadsworth, Joseph Biggs, and Harvey Elam, Defendants.

5 1. The plaintiffs, Kate Applegate, William Applegate, and Harriet B. Clark, citizens of the State of Georgia; Charlotte Hollingsworth, a citizen of the State of Missouri, and Martha A. Clark and James Clark, citizens of the State of Louisiana, say that they are citizens respectively of the aforesaid several States; that the defendants, The Lexington and Carter County Railroad and Mining Company, The Norton Iron Works Company, The Buena Vista Furnace Company, and The Hunnewell Furnace Company, are corporations duly chartered and organized under the laws of the State of Kentucky, and carrying on business within said State and district; and that the defendants, Allen Carroway, Joseph Morris, Polly Montgomery, Reuben Ward, Charles Spangler, Robert Wright, Henry Carroway, Samuel Moore, John Boyce, Mrs. —— Carroway, James Carroway, Moses Adams, W. H. Wadsworth, Joseph Biggs, and Harvey Elam, are citizens of the State of Kentucky.

They further say that the plaintiffs, Kate Applegate, Harriet B. Clark, and Charlotte Hollingsworth and James Clark were the only children and heirs-at-law of Cary L. Clark, late of the Commonwealth of Kentucky; that prior to the institution of this suit the aforesaid James Clark departed this life, leaving a son, the plaintiff, James Clark, who is his only child and heir-at-law; that the plaintiff, William Applegate, is the husband of the plaintiff, Kate
6 Applegate, and that the plaintiff, Martha A. Clark, is the widow of James Clark, son of said Cary L. Clark.

They further say that at the time of his death the aforesaid Cary L. Clark was seized in fee simple of a certain tract of land containing eight thousand three hundred and thirty-four (8,334) acres, situated within the present limits of the counties of Greenup, Carter and Boyd, in the State of Kentucky; that the whole of said tract of land was embraced within one survey, and was covered by a single patent, and that said Cary L. Clark had, and the plaintiffs under him have, one and the same title to each and every part thereof; that said tract of land is a part of a certain tract of eighteen thousand (18,000)

acres granted to Charles Fleming by the Commonwealth of Virginia by letters patent of date April 21st, A. D. 1792, and bounded as follows: Beginning at the east corner of William Fitzhugh's twelve thousand acre entry at five hickories and six white oaks, standing in a bottom, and running thence S. 45° W. 1,280 poles, crossing branches to two red oaks, two dogwoods and a maple; thence S. 45° E. 2,250 poles, crossing branches, to five white oaks; thence N. 45° E. 1,280 poles, crossing branches, to a stake; thence N. 45° W. 2,250 poles, crossing branches, to the beginning; and

7 that the aforesaid tract of eight thousand three hundred and thirty-four (8,334) acres is bounded as follows, to wit: Beginning at the most southerly corner of the aforesaid tract of eighteen thousand (18,000) acres at five white oaks, and running thence N. 45° E. 1,280 poles, to a stake; thence N. 45° W. from the two last mentioned bounds, far enough to include eight thousand three hundred and thirty-four (8,334) acres. The aforesaid Cary L. Clark derives title to said land by a regular and unbroken chain from the aforesaid Charles Fleming, the patentee thereof. Certified copies of the aforesaid patent to Charles Fleming and of the subsequent deeds thereunder by which said tract of land passed to said Cary L. Clark will be filed herein hereinafter if required, the originals of said conveyances not being in the possession of the plaintiffs.

The plaintiffs further say that the aforesaid tract of eight thousand three hundred and thirty-four (8,334) acres belongs to them, and that they are entitled to the possession thereof; and that the defendants have unlawfully entered upon said land and now wrongfully withhold the possession of the same from the plaintiffs. The plaintiffs are informed and believe that the defendants claim said land under a patent that conflicts with, and is subsequent to, the aforesaid patent to Charles Fleming, under which the plaintiffs claim.

2. The plaintiffs further say that by the wrongful possession and detention of the aforesaid tract of land by the de-

8 fendants, they, the said plaintiffs, have been damaged in the sum of one hundred thousand dollars ($100,000).

Wherefore the plaintiffs pray that said tract of land, and the possession thereof, be adjudged to them, with one hundred thousand dollars ($100,000) damages sustained as aforesaid, costs of suit, and all other proper relief.

W. W. HELM.
W. T. CRUTCHFIELD, AND
D. W. ARMSTRONG, *P. Q.*

Mrs. Kate Applegate, being duly sworn, says on her oath, that the allegations contained in the foregoing petition are true, to the best of her knowledge, information, and belief.

C. M. APPLEGATE.

Sworn to and subscribed before me, by Mrs. Kate Applegate, this 19th day of July, 1877.

W. W. HELM, *N. P., J. C.*

Said petition is endorsed on the back, as follows:

Kate Applegate, &c., *vs.* L. & C. Co., R. R. and Mining Co. &c. Order of survey. "D."

MONDAY, *August 27th*, 1877.

In the clerk's office, before the clerk, this day came the
9 plaintiffs, by W. W. Helm and D. W. Armstrong, their attorneys, and on their motion, it is ordered that John Robb do go on the land in controversy in this suit, on the 18th day of September, 1877, and then and there lay off the same, as either party may direct, having due regard for all deeds and other evidences of title that may be produced, reporting all matters of fact specially; and that he make out and return to the clerk's office of this court two fair plats and report of such survey, on or before the day fixed for the trial, and the marshal, or one of his deputies, is directed to attend said survey, to remove force, should any be offered.

The summons marked "B," above referred to, is in the words and figures following, to wit:

The President of the United States of America to the marshal of the Kentucky district, Greeting:

You are commanded to summon The Lexington & Carter County Railroad and Mining Company, The Norton Iron Works Company, The Buena Vista Furnace Company, The Hunnewell Furnace Company, Allen Carroway, Joseph Morris, Polly Montgomery, Reuben Ward, Charles Spangler, Robert Wright, Henry Carroway, Samuel Moore, John Boyce, Mrs. —— Carroway, James Carroway, Moses Adams, W. H. Wadsworth, Joseph Biggs, Harvey Elam, to
10 answer on the first day of the next October term of the circuit court of the United States for the district of Kentucky, to be held at the city of Louisville, a petition against them in said court by Kate Applegate, William Applegate, Harriet B. Clark, Charlotte Hollingsworth, Martha A. Clark, and James Clark, and warn them that upon their failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next term of said court.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Louisville, in the said district, this 20th day of July, in the year of our Lord 1877, and of our Independence the 102nd.

[SEAL.] SAM'L B. CRAIL, *C. C. C., K. D.*,
By HENRY F. CASSIN, *Deputy.*

Upon which summons the following endorsements were made, viz:

Executed by delivering a copy of the within process to Mr. Joseph Wolfolk, pres. Lexington & Carter Co. R. R. & Mining Co., in Lexington, Ky., this 15th day of August, 1877.

R. H. CRITTENDEN, *U. S. M.*
H. THOMPSON, *Deputy M.*

11 Executed by delivering a copy of the within processes to the following named persons: H. W. Bates, vice-pres. Hunnewell Furnace Co., or rastern Ky. Railway, at Riverton, Greenup Co., Ky., Aug. 16th, 1877, at 8 o'clock a. m.; Mosses Adams, Aug. 16th, at Hunnewell Furnace, Greenup Co., Ky.; John Boyce, Greenup Co., Ky., 2 miles north of Carter Co. line; Chas. Spangler, same time and place, Aug. 16th, 1877, at 10 o'clock p. m.; Jas. Norris, Mrs. Carroway, Henry Carroway, Allen Carroway, James Carroway, Robert Wright, and Polly Montgomery, in Carter Co., Ky., Aug. 17th, 1877; Edw. Moore (son of Sam'l Moore), Maria Ward (wife of Reuben Ward), Miss Elam (daughter of Harvey Elam), at their residence in Carter Co., Ky., Aug. 17th, 1877; W. W. Culbertson, at Buena Vista Furnace, in Boyd Co., Ky.; also by delivering a copy to him for K. R. Culbertson, he accepting the same for his brother, they comprising part of the firm of Culbertson, Means & Culbertson, owners of the Buena Vista Furnace Co., (this company not incorporated), (Mr. Means lives in Ohio), 17th of Aug., 1877; John Russell, pres. of the Norton Iron Works, at Ashland, Boyd Co., Ky., at 8 o'clock p. m., Aug. 17th, 1877; W. H. Wadsworth, at Maysville, Mason Co., Ky., 18th Aug., 1877; Joseph Biggs not found.

R. H. CRITTENDEN, *U. S. M.*,
By FRANK. MADDEN, *Dep. Mar.*

Service acknowledged and accepted Aug. 18th, 1877.
W. H. WADSWORTH.

12 The *alias* process, marked "C," above referred to, is in the words and figures following, viz:

The President of the United States of America to the marshal of the Kentucky district, Greeting:

You are commanded to summon The Lexington & Carter County Railroad and Mining Company, The Norton Iron Works Company, The Buena Vista Furnace Company, The Hunnewell Furnace Company, Allen Carroway, Joseph Morris, Polly Montgomery, Reuben Ward, Charles Spangler, Robert Wright, Henry Carroway, Samuel Moore, John Boyce, Mrs. Carroway, James Carroway, Moses Adams, W. H. Wadsworth, Joseph Biggs, and Harvey Elam to answer on the first day of the next October term of the circuit court of the United States for the district of Kentucky, to be held at the city of Louisville, a petition against them in said court by Kate Applegate & others, and warn them that upon their failure to answer the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next term of said court.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Louisville, in the said district, this 28th day of August, in the year of our Lord 1877, and of our Independence the 102.

13 SAM'L B. CRAIL, *C. C. C. K. D.*,
By HENRY F. CASSIN, *Deputy.*

Upon which *alias* process the following endorsement was made viz:.

Executed by delivering a copy of the within process to the following-named persons: Samuel Moore, in Greenup county, Sept. 5th, 11 a. m.; Reuben Ward, in Carter Co., Sept. 5th, 10 o'clock p. m.; Harvey Elam, in Carter Co., Sept. 6th, 11 a. m.: Joseph Biggs, not found in the district.

R. H. CRITTENDEN, *U. S. M.*,
By F. MADDEN, *D. M.*

To be executed on Samuel Moore, Reuben Ward, Harvey Elam, and Joseph Biggs only.

SAM'L B. CRAIL, *Clerk*,
By HENRY CASSIN, *D. C.*

The exhibit, marked "D, above referred to, is in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Kentucky.

MONDAY, *August 27th*, 1877.

In the clerk's office before the clerk.

KATE APPLEGATE *et al.*

vs.

THE LEX. & CARTER CO. R. R. AND MINING CO., &c.

14 This day came the plaintiffs, by W. H. Helm and D. W. Armstrong, their attorneys, and on their motion it is ordered that John Robb do go on the land in controversy in this suit on the 18th day of September, 1877, and then and there lay off the same, as either party may direct, having due regard for all deeds and other evidences of title that may be produced, reporting all matters of fact specially; and that he make out and return to the clerk's office of this court two fair plats and report of such survey on or before the day fixed for the trial. And the marshal, or one of his deputies, is directed to attend said survey to remove force, should any be offered.

A copy.

Witness my hand seal of said court, this 29th day of Aug., 1877.

[SEAL.] SAM'L B. CRAIL, *Clerk*.
By HENRY F. CASSIN, *D. C.*

The Exhibit marked "E." above referred to, is in the words and figures following, to wit:

Answer of the Lexington & Carter Co. Min. Co.

In the Circuit Court of the United States for the District of Kentucky, in the Sixth Circuit.

KATE APPLEGATE & *als.*, Plaintiffs,
vs.
THE LEXINGTON AND CARTER COUNTY MINING COMPANY and others Defendants.

14½ 1. This defendant, The Lexington & Carter County Mining Company, for answer says: That it is a corporation organized and existing under the laws of the State of Kentucky; that it denies its name is the Lexington & Carter County Railroad & Mining Company, and it denies that there is any such a corporation as the one last named, or that any such company claims or is possessed of any of the lands sued for.

2. And for further answer this defendant further says that it has no sufficient knowledge or information, nor has its officers, that the plaintiffs are not citizens of Kentucky, or that same are citizens of Georgia, some of Louisiana and some of Missouri, or of what State or States they are citizens. This defendant has no sufficient knowledge, and no sufficient information on which to form a belief that the plaintiffs, or any of them, are heirs-at-law of Cary L. Clark, or who are his heirs-at-law.

3. This defendant for further answer says, that it denies, at the time of his death, or that at any other time, said Cary L. Clark was seized of an estate in fee simple, or of any other estate or interest in any of the 8,334 acres of land sued for, and it denies that he had at any time any title to any of it, or that the plaintiffs ever desired any from him, or any other, or ever had at any time title to any
15 of it. It denies that Cary L. Clark derived any by any regular and unbroken chain from Charles Fleming or any other.

4. This defendant denies that the 8,334 acres of land, or any of it, belongs to the plaintiff or any of them, and it denies plaintiffs, or any of them, are entitled to the possession of any of it that this defendant has, and it denies that it has kept them out of possession, unlawfully and wrongfully, or wrongfully detain it or any part from them, or that it has wronfully and unlawfully entered into possession of any part of it.

5. It denies that by reason of any entry on or possession of any of it, (for the same was not wrongful or unlawful), the plaintiffs have been damaged $100,000, or any other sum, or that they have any right to recover of this defendant that, or any other, sum for any supposed entry and detention.

6. This defendant denies that the patent under which plaintiff's claim gives the superior right derived from the State for the land claimed to be covered by it, because it says that on the 30th day of October, 1783, there was a Virginia entry made in the name of Wm. Grayson for 70,000 acres; that said entry was entered and filed in the proper surveyor's office as provided by law, and was surveyed

on 2nd Dec'r, 1785, and on the 25th day of June, 1795, was
16 carried into grant; that the entry, survey, and grant to Grayson conflicts and laps upon the supposed grant of 18,000 acres to Fleming; that this defendant claims and owns land derived from Grayson's title in the supposed conflict with Fleming; that by reason of the elder entry and survey under Grayson, the entry and survey and patent founded on them granted to Fleming is void, and the grant to Grayson is the oldest and paramount title therefore.

7. This defendant further says that the lands owned by this defendant, and which plaintiffs claim and sue for, lie within said survey and grant to Wm. Grayson; that this defendant and those from whom and under whom it claims and derives title, have for more than 30 years claimed, held, and occupied said lands by cultivation, improvement, and actual occupancy by themselues and tenants within regular marked and defined boundaries, and claiming to the extent of said boundaries, continuously and adversely, as their own adverse to the world for more than 30 years before plaintiffs sued, and it pleads and relies on all limitation laws of Kentucky to bar plaintiff's right to recover any of them, or any recovery against this defendant in this suit.

Wherefore defendant prays judgment, it be dismissed from this suit, recover judgment for its costs & all proper relief.

ED. F. DULIN,
For Def't.

17 The Circuit Court of the United States, 6th Circuit, in the District of Ky.

H. G. Craig, treasurer, being duly sworn, on his oath says that he is the treasurer of defendant, ———, of The Lexington & Carter County Mining Company, a corporation of Kentucky; that the president and chief officer is absent from the country, and that the allegation of this answer are true, to the best of his knowledge, information, and belief.

H. G. CRAIG, *Treasurer.*

Sworn to and subscribed to before me, by H. G. Craig, this 1st day of October, 1877.

SAM'L B. CRAIL, *Clerk,*
By HENRY F. CASSIN, *D. C.*

Answer of the Eastern Ky. Railway Co.

The answer of the Eastern Ky. Railway Co., marked "F," above referred to, is in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Kentucky, in 6th Circuit.

KATE APPLEGATE & *als.*, Plaintiffs,
vs.
THE LEXINGTON & CARTER CO. R. R. AND MINING CO., Defendants.

1. This defendant, The Eastern Kentucky Railway Company,

says that it is a corporation existing under special enactments
18 of the General Assembly of Kentucky; that it denies that there is any such corporation as "The Hunnewell Furnace Co.," or that any such company claim or have possession of any of the lands sued for.

2. This defendant, the said Eastern Ky. Railway Company, sued as said "Hunnewell Furnace Co.," further says, that it and its officers have no sufficient information and no sufficient knowledge on which to form a belief that the plaintiffs are some of them citizens of Georgia, some of Louisiana, and some of Missouri, or in what State or States they reside. This defendant has no sufficient knowledge or information, nor has its officers, on which to found any belief that the plaintiffs are the heirs at law of Cary L. Clark, or who are his heirs.

3. This defendant, the E. Ky. R'way Co., for further answer says, that it denies that at the time of his death said Cary L. Clark was seized of an estate in fee-simple, or any other estate or interest in any part of the 8,334 acres of land sued for, and it denies that said Cary L. Clark had or the plaintiffs ever had, derived from him, or otherwise, any title or any interest to or in any of said land, and it denies that Cary L. Clark derived any title by any regular and unbroken chain of title from Charles Fleming, or any other.

19 4. This defendant denies that the said 8,334 acres of land, or any of it, belong to the plaintiffs, or any of them, and it denies plaintiffs, or any of them, are entitled to the possession of any of it, and it denies this defendant has unlawfully entered on and unlawfully kept possession of any of it, nor has it wrongfully withheld from plaintiffs the possession of any part of said lands. A portion of land sued for defendant claims under patent senior to that to Charles Fleming.

4. This defendant denies that by the entry and possession of any of what it is sued for (and this entry on and possession by it of any is not wrongful), the plaintiffs have been damaged by it $100,000, or any other sum, or that plaintiffs are entitled to recover $100,000 in damages against it, or any other sum.

5. And for further answer, this defendant says that a portion of lands claimed by the plaintiffs as covered by the patent of Charles Fleming for 18,000 acres, and for which plaintiffs have sued (but the amount this defendant cannot state, as the same has not been surveyed and ascertained), this defendant holds title to by regular, unbroken title from the patentee, Daniel Henry; that the entry, survey, and patent to Daniel Henry covering this, &c., from whom defendant gets title, is by the State of Virginia, and is
20 older and superior to that to Fleming, under which plaintiffs claim, but as defendants have not that patent, or the entry and survey before it, or its attorneys, the exact dates herein cannot be stated now.

6. This defendant, for further answer, says that the entry, survey, and patents to Hugh Stewart and Ann Stuart cover another portion of land claimed by plaintiffs, but which belong to and is in possession of the defendants (but how much, as it has not been surveyed

and ascertained, it cannot tell); that the said entries, surveys, and patents to said Hugh Stewart and to Ann Stewart are older and superior to the patent of Chas. Fleming of 18,000—under and by and through which plaintiffs claim; wherefore, &c.

7. This defendant, for further answer, says that it denies that the patent under which plaintiff claims gives the oldest and superior title derived from the State for the land claimed to be covered by it, because it says that on the 30th day of October, 1783, there was an entry made in the name of William Grayson for 70,000 acres; that said entry was entered and filed in the proper surveyor's office, and was, on the 2nd day of December, 1785, surveyed, and on the 25th day of June, 1795, the survey was carried into grant, and patent issued by the State of Kentucky; that said entry, survey, and grant conflicts with and laps on that under which plaintiffs claim,
21 to wit, the supposed patent of 18,000 acres to Charles Fleming; that this defendant derives title to certain lands, and claims and owns lands, within the supposed conflict; that said entry and survey under Grayson, being older, is better than that under Fleming; that by reason thereof the entry and survey and patent founded on the same under Fleming is void; wherefore, &c.

8. This defendant, for further answer, says that it has some lands in its possession, and claims the same as its property, which plaintiffs claim to be covered and embraced by Fleming, and which are in the supposed lap of Fleming and Grayson; that the land has been by this defendant and by those under and from whom it claims by actual occupancy and in actual possession, claiming the same by regular and defined boundaries which it had, and to the extent of the boundaries, by occupancy, by cultivation, and improvement continuously for more than 30 years next before plaintiffs sued, claiming the same adverse to plaintiffs and all others, and as their property, and it therefore pleads all limitation laws of Kentucky in bar of plaintiffs' right of recovery, and denies their right to any recovery in this suit.

Wherefore defendant prays judgment herein that it be dismissed from this action, and have judgment for its costs and all proper relief.

ED. F. DULIN,
Def't's Att'y.

22 The Circuit Court of the United States, 6th Circuit, in the District of Kentucky.

H. W. Bates, being duly sworn, says on his oath: That he is the vice-president and managing agent and superintendent of the said Eastern Kentucky Railroad Company, a corporation of Ky.; that the president is now absent from this county and State, and that the allegations contained in the foregoing answer are true to the best of his knowledge, information, and belief.

H. W. BATES.

Sworn to and subscribed to before me, this first day of October, 1877, by H. W. Bates.

SAM'L B. CRAIL,
U. S. Com'r.

Answer of Chas. Corum.

The answer of Chas. Corum, &c., marked "G," above referred to, is in the words and figures following, to wit:

In the Circuit Court of the United States, 6th Circuit, in the District of Ky.

KATE APPLEGATE *et als.*, Plaintiffs,
vs.
THE LEXINGTON & CARTER COUNTY R. R. & MINING COMPANY & others, Defendants.

This defendant, Charles Corum, by permission of this court, defending and answering for Moses Adams, W. H. Wads-
23 worth, and James Carroway, defendants hereto, and for himself, says: That he has no sufficient knowledge or information on which to found a belief, or any belief, that the plaintiffs are not citizens of Kentucky, or that any of them are citizens of the States of Georgia, Louisiana, or Missouri; and he has no sufficient knowledge that the plaintiffs, or any of them, are heirs-at-law of Cary L. Clark, nor has he any sufficient information thereof upon which he can found any belief, or who are his heirs. He denies that at his death, or at any time, Cary L. Clark was seized of an estate in fee simple, or of any other estate, or interest in the 8,334 acres of land sued for, or any of it, and he denies that Cary L. Clark or the plaintiffs, or any of them, have now or ever had title to said lands, or any of them, and he denies that Cary L. Clark or the plaintiffs ever derived title, by regular and unbroken chain or otherwise, to any of it. He denies that plaintiffs, or any of them, are the owners of any of said land. He denies that he has wrongfully entered on, or wrongfully holds possession of, any of it from plaintiffs.

2. And for further answer this defendant says that he has not the possession wrongfully, and does not wrongfully detain the possession of any of it from plaintiffs; and he denies that by reason of any possession and detention from them of any of it, or for
24 any other cause, they have a right to recover $100,000 damages, or any other sum, against him.

3. And for further answer this defendant says that he holds possession and detains from plaintiffs certain lands as his own, and which are rightfully his, which may be covered by the 8,334 acres sued for by plaintiffs; that the amount he so has is about 478 acres; but he denies that plaintiffs are entitled to recover or have of him the possession of any of it, because he says all of this 478 acres are within, embraced, and covered by the patent of Virginia to Daniel Henry, of date —— day of ——, 17— (the exact dates he cannot now state, as the patent is not before him); that that grant, the entry, and survey on which it is founded and issued are older than the

entry and survey of the patent under which plaintiffs claim; that this defendant holds title to this land, 478 acres, by a regular and unbroken chain of title from the patentee, Daniel Henry; so he denies plaintiffs' right to any recovery against him, or against Moses Adams, James Carroway, and W. H. Wadsworth. Wherefore, &c.,

3. This defendant further says that he and those under and through whom he claims have had possession of the 478 acres of land by improvement, cultivation, and actual occupancy within, and claiming to regular defined and marked boundaries
25 thereof, for more than 30 years next before plaintiffs' suit, claiming the land as theirs to the extent of said boundaries, and he pleads all laws of limitation of Kentucky in bar of plaintiffs' recovery of any of the lands claimed, owned, and possessed by him. And he prays that he recover judgment herein; that the plaintiffs' petition be dismissed for his costs, and all proper relief.

ED. F. DULIN,
Of Counsel for Def't.

STATE OF KENTUCKY, *Greenup County:*

Charles Corum, being duly sworn, on his oath, says: That the allegations contained in the foregoing answer are true, to the best of his knowledge, information, and belief.

CHARLES CORUM.

Sworn to and subscribed before me, this 28th day of September, 1877, by said Charles Corum.

In testimony, I, a notary public of the State of Kentucky, in and for Greenup county, do set my name and affix my official seal, the date last written.

[SEAL.] JEREMIAH DAVIDSON, *N. P.*

The answer of John Boyce and Sam'l T. Moore, marked
26 "H," above referred to, is in the words and figures following, to wit:

Answer.

In the Circuit Court of the United States, for the 6th Circuit, in the District of Kentucky.

KATE APPLEGATE & others, Plaintiffs,
vs.
THE LEXINGTON & CARTER COUNTY R. R. & MINING Co. & others, Defendants.

1. These defendants, John Boyse and Samuel T. Moor, say: They have no sufficient knowledge or information on which they can form a belief that plaintiffs, or any of them, are citizens of Georgia or of Louisiana, or of Missouri, or that any of them are not citizens of Kentucky; they have no sufficient knowledge or information that plaintiffs, or any of them, are the heirs-at-law of Cary L. Clark, or who were or are his heirs; they deny that at his death, or at any time, that said Cary L. Clark was seized of an estate in fee simple

or any other estate or interest in the 8,334 acres of land sued for, or of any of it; and they deny that he or the plaintiffs ever had title to any of the land in the possession and claimed by defendants; they deny he derived title to any of the lands they have, either unbroken or otherwise, and they deny that he or the plaintiffs have a regular and unbroken chain of title to any aforesaid lands, or ever had from any one, or any title of any sort, or that any of the
27 lands held and claimed by either of these defendants belong to the plaintiffs, or any of them, and they deny that they have wrongfully entered and wrongfully held possession of any lands so claimed and held by defendants from said plaintiffs.

2. These defendants each say that where the plaintiffs claim the 8,334 acres to be as they are informed and believe the same to be none of the lands claimed and possessed by the defendants are embraced by the track of 8,334 acres sued for by them. So each of those defendants say that they have and are in possession of no lands which plaintiffs have sued for. And that they are not in possession and do not claim any lands in the 8,334 acre tract.

3. Each of these defendants say that they, and those through and under whom they claim the lands they are in possession of, have had the continuous actual, adverse possession of the lands they claim and have, by cultivation, improvement, and residence on the same, claiming to the extent and within the boundaries claimed by them, which are marked and defined for more than 20 years before plaintiffs have sued, and they plead and rely on all laws of limitation of Kentucky in bar of plaintiffs recovery.

4. They deny plaintiffs are entitled to recover of them $100,000 or any other sum for any supposed detention of lands
28 from said dlaintiffs. Wherefore they pray to be hence dismissed for their costs, and all proper relief.

STATE OF KENTUCKY, } *sct:*
Carter County. }

John Boyes and Samuel Moor, being each duly sworn, says on his oath, that the allegations contained in the foregoing answer are true, to the best of his knowledge, information, and belief.

JOHN BOYSE,
SAMUEL T. MOORE,

Sworn to and subscribed by each, before me, Sept. —, 1877, by John Boyse and Samuel Moor.

In testimony, I notary, public of Carter county, Kentucky, do put my name and official seal the date last written.

[SEAL.] A. H. FRIZELL,
Notary Public of Carter County, Ky.

Answer of def't, Norton Iron Works, marked "J," above referred to, is in the works and figures following, to wit:

The Circuit Court of the United States, 6th Circuit, in the District of Kentucky.

29 *Answer of Norton Iron Works.*

KATE APPLEGATE & others, Plaintiffs,
vs.
THE LEXINGTON & CARTER COUNTY R. R. & MINING CO. & others, Defendants.

1. The defendant, Norton Iron Works, for answer, says: That it is a corporation, created by the laws of Kentucky; that it has no knowledge or sufficient information, nor has its officers, upon which to found a belief that the plaintiffs, or any of them, are the children and heirs-at-law of Cary L. Clark, or that they, or either of them, are his heirs-at-law. Wherefore, &c.

2. And for further answer defendant, Norton Iron Works denies that Cary L. Clark, at the time of his death, or at any other time, was the owner in fee-simple, or otherwise, of the tract of land described in the petition and sued for, or any part thereof. The alleged conveyances are not on file and not now accessible to def't, but it denies that there are any such conveyances that vested title in Cary L. Clark to the Charles Fleming patent of 18,000 acres, or any part thereof. Defendant denies that the beginning corner of the Charles Fleming patent of 18,000 acres is at the place stated in the petition, but if it is, then defendant denies that it covers the land for which this def't is sued.

Defendant denies the right of the plaintiffs, or either of them,
30 to recover any lands in its possession, and for which it is sued; denies that pl'ffs, or either of them, are the owners, or entitled to the possession of any part thereof; denies that Cary L. Clark was ever the owner of any part thereof, or that he at any time had title thereto, or that any title thereto passed by descent, or otherwise, to the plaintiffs, or either of them. Wherefore, &c.

3. And for further answer def't, Norton Iron Works says: That plaintiffs ought not to recover the land sued for, or any part thereof, because this defendant says that there was issued by the State of Kentucky to Col. Wm. Grayson a patent for 70,000 acres of land; that the land in this defendant's possession, and for which it is sued, lies within the last-named patent, and this defendant is the owner thereof by title derived by conveyances, which vest it with the Grayson title; that it has not only a legal paper title, but def't says that by itself, by tenants, and those under and through whom it claims, have had the actual possession continuously by residence, cultivation, and improvement, and within the lap, or supposed lap, of the said patent of Grayson and Charles Fleming patent; that this defendant, and those under whom it claims so held the actual continuous possession under the Grayson patent, and to a well-defined and marked boundary, claiming the same as its and their own, adverse to the plaintiffs and all others, for more than thirty years before this
31 suit was brought, and def't pleads and relies on all laws of limitation of the State of Kentucky in bar of the plaintiff's

right to recover the land sued for, or for damage for any supposed wrongful entry or detention. Wherefore, &c.

4. And for further answer def't, Norton Iron Works, says: That the land for which it is sued lies within the entry and survey of the lands covered by patent issued by the Commonwealth of Kentucky to Wm. Grayson for 70,000 acres, and under which it claims and holds the lands for which it is sued; that said entry and survey upon which the Grayson patent issued is older and superior to the entry and survey of the lands of the patent to Charles Fleming for 18,000 acres, under which plaintiffs claim; that the title under the Grayson patent passed an older and superior equity, in virture of the entry and survey upon which it issued, and the patent a superior legal title to that of the Charles Fleming patent.

Wherefore it prays judgment to be dismissed, with its costs, and for all appropriate relief, &c.

HAMPTON, MOORE, DOOLIN, *Att's.*

STATE OF KENTUCKY, }
County of Boyd, } *ss:*

John Russell, on oath, says: That he is the president and chief officer of defendant, Norton Iron Works (sued by the name
32 of "The Norton Iron Works Company"), and that the statements of the foregoing answer he believes are true.

JOHN RUSSELL.

Subscribed and sworn to before me by John Russell, who is well known to me.

In testimony whereof, I hereby subscribe my name and affix my official seal, the 28th day of September, 1877.

W. C. RICHARDSON,
Notary Public.

The petition of Chas. Corum, marked "K," above referred to, is in the words and figures following, to wit:

Pet. of Chas. Corum.

In the Circuit Court of the United States for the 6th Circuit in the Kentucky District, District of K'y.

KATE APPLEGATE & *als.*, Plaintiffs,
vs.
THE LEXINGTON & CARTER CO. RAIL R. & MINING CO., &c., Defendants.

This petitioner, Charles Corum, says: That Moses Adams, James Carroway, & Wm. H. Wadsworth are, as he learns, is informed, believes, and so says, are sued in this suit for land which they do not have, and did not when the suit was brought, in their possession, and to which they did not have any title or claim, but which was then and is now in possession of this petitioner,
33 and which he owns and claims as his land. This land was owned by the heirs of Daniel Henry. Wm. H. Wads-

worth had a debt against them; had it sold by the Greenup circuit court, Ky., and judgment in his favor; bought and obtained a conveyance, and then sold it to Allen Adams. Moses Adams, having married a daughter of Allen Adams, got in possession, as this petitioner believes, of some of it under and through him, and then put James Carroway in possession of a portion.

Wadsworth then, after the death of Allen Adams, his vendue, to enforce his claim for purchase money, sued the heirs of Allen Adams, etc., Moses Adams being a defendant in the Greenup circuit court, Ky., and obtained a judgment of that court to sell the land to pay him. It was sold and purchased by this petitioner, the sale confirmed by said court, a writ of possession was issued in his favor, and he put in possession, turning Carroway, Moses Adams, and the heirs of Allen Adams out of possession, and petitioner was in possession, owning the lands when sued. This petitioner, as said Moses Adams, James Carroway, and W. H. Wadsworth refuse to defend this suit for this land, prays that he, this defendant, may be made a defendant to defend for this land, for and in the room and stead of said Moses Adams, James Carroway, and W. H. Wadsworth, or in conjunction with them, and file an answer for himself to be
34 taken as a defence for them. He hence presents said answer as his and their defence.

This petitioner says the allegations contained in the foregoing petition or true to the best of his knowledge, information, and belief.

CHARLES CORUM.

Sworn to and subscribed before me, this 28th September, 1877, by Charles Corum, well known to me.

In testimony, I, a notary public of Kentucky in and for Greenup county, do put my name and affix my official seal this date last written.

[SEAL.] JEREMIAH DAVIDSON,
Notary Public, Greenup County, Ky.

"For answer of Chas. Corum, see page 22."

The agreement marked "L," above referred to, is in the words and figures following, viz:

Whereas in the United States circuit court, 6th circuit, in the district of Ky., in the suit of Kate Applegate & *al.* against the Lexington & Carter County Railroad and Mining Company & others, the plaintiffs have agreed to a compromise with John H. Carroway, Robert C. Wright, and Reuben Ward, defendants therein, upon the following terms: Each of said defendants have agreed to pay
35 the plaintiffs, and have executed their notes, sums respectively payable in 12 months from the 26th day of September, 1877; J. H. Carroway, $28.00; Robert C. Wright, $28.00; Reuben Ward, $62.00; for all the lands they and each of them have and claim, including in Robert C. Wright's tract the dower interest of Hannah Carroway, each for himself, which may be covered by the 8,334 acres claimed by the plaintiffs, or that the said defendants have in

possession within the boundary of said 8,334 acres, and estimated at 26 acres in possession of J. H. Carroway, 26 in possession of Robert C. Wright and Hannah Carroway, and 60 acres in possession of Reuben Ward.

The said defendants, J. H. Carroway, Robert C. Wright, and Hannah Carroway, and Reuben Ward are to be dismissed from the said suit, and this agreement is to be entered as the judgment of said court.

W. W. HELM & N. T. CRUTCHFIELD,
Att'ys for Pl'ffs, Kate Applegate & al.

It is further agreed by the plaintiffs, Kate Applegate & *als.*, that if the lands of the said defendants, J. H. Carroway, Robert Wright, Hannah Carroway, and Reuben Ward, or any of them or any part of said lands, shall be without the boundary of said 8,334 acres claimed by the plaintiffs in said suit against the Lexington & Carter County R. R. & Mining Company & others, according to the
36 survey of the official survey or appointed by the court in said case, then the said defendants, J. H. Carroway, Robert Wright, and Reuben Ward, shall be charged only for the lands lying within said boundary at the rate of one dollar per acre for the land claimed by them within said boundary, and their notes shall be credited with the excess of said the amount of said notes over the amount due according to said survey.

W. W. HELM AND N. T. CRUTCHFIELD,
Att'ys for Pl'ffs, K. Applegate & als.

The agreement marked "M" above referred to is in the words and figures following, viz:

Whereas in the United States circuit court, 6th circuit, in the district of Ky., in the suit Kate Applegate & *al.* against The Lexington and Carter County R. R. & Mining Company & *al.*, the plaintiffs have agreed to a compromise with Joseph Norris, Harvey Elam, and Allen Carroway, defendants therein, upon the following terms: Each of said defendants have agreed to pay the plaintiffs and have executed their notes for the following sums respectively, payable in 12 months from the 26th day of September, 1877: Joseph Norris, $24.00; Harvey Elam, $130.00; Allen Carroway, $130.00; for all the lands which they and each of them have and claim each
37 for himself, and which may be covered by the 8,334 acres claimed by the plaintiffs in said suit, or that the said defendants have in possession within the boundary of said 8,334 acres, and supposed to be twenty-four acres in the possession of said Joseph Norris, one hundred and thirty acres in the possession of Harvey Elam, and one hundred and thirty-nine acres in the possession of Allen Carroway.

The said defendants, Norris, Elam, and Carroway, are to be dismissed from this suit, and this agreement is to be entered as the judgment of said court between the plaintiffs and the aforesaid defendants.

W. W. HELM AND N. T. CRUTCHFIELD,
Att'ys for the Plaintiffs, Kate Applegate & als.

It is further agreed by the plaintiffs in the suit of Kate Applegate and others against The Lexington & Carter County R. R. & Mining Company and others, that if the lands of said defendants, Jos. Norris, Harvey Elam, and Allen Carroway, shall be not within the boundary of the 8,334 acres claimed by plaintiffs in said suit, or if any part of their land shall be without the boundary of said 8,334 acres according to the survey of the official surveyor of said court, then the plaintiffs shall not be charged for more than the land within the said boundary at the rate of one dollar per acre for the amount of land within said boundary, and the notes of
38 the said defendants are to be respect*fuly* credited with the excess of their notes over the amount thus appearing due.

W. W. HELM AND N. T. CRUTCHFIELD,
Att'ys for the Plaintiffs, Kate Applegate & Als.

Defendants Culbertson, Means & Culbertson, by their attorneys, Wadsworth & Moore, filed in the clerk's office of our said court their answer.

Which said answer is in the words and figures following, to wit:

Answer of Culbertson, Means, & Culbertson.

United States Circuit Court for the District of Kentucky.

KATE APPLEGATE, &c., Plaintiffs,
vs.
THE LEXINGTON & CARTER CO. R. R. & MINING CO., &c.,
Defendants.

Thos. W. Means, W. W. Culbertson, and K. R. Culbertson, improperly made defendants herein, under the name and style of the Buena Vista Furnace Co., state by way of answer to the petition herein, that they are partners, doing business as such, under the firm name of Culbertson, Means & Culbertson, and are the owners and in the possession of the Buena Vista Furnace lands in the county of Boyd, State of Kentucky.

1. They deny that plaintiffs are residents or citizens of the
39 States claimed by them in the petition, or that they are all non-residents of the State of Kentucky, but on the contrary, they state that they are advised, believe, and charge that:

One of the plaintiffs is a resident and citizen of the State of Kentucky, and was at the date of the institution of this suit, and they plead and rely on the fact in bar of the jurisdiction of this honorable court, and say that this court has no jurisdiction to hear or decide the matters and things.

2. For further answer, def'ts say that they do not know that plaintiffs, or any of them, are heirs-at-law of Cary L. Clark, and have no sufficient knowledge or information to form a belief that they, or either of them, are the heirs of Cary L. Clark; nor do the def'ts know that James Clark is dead, nor have they any sufficient knowledge or information thereof to form a belief that he is dead; nor do these defendants know that the plaintiff, James Clark, is the heir, or

only heir-at-law of James Clark, who is stated as dead by plaintiffs in their petition, nor have they any sufficient knowledge or information to form a belief concerning this matter.

3. The defendants deny that Cary L. Clark at his death, or at any time, was seized in fee simple of the tract of land of 8,334 acres, described in the petition, or of any part thereof, and they deny that said Clark had any title thereto, or that plaintiffs, under
40 him, or under any one, have any title to said land, or any part thereof; and defendants especially deny that said Cary L. Clark ever derived any title to the land described and claimed in the petition from Charles Fleming, the patentee, by any chain of title, or in any manner; and defendants deny that plaintiffs have any deeds or conveyances whatever manifesting any derivation of title from said Fleming, or that said Fleming ever had any title thereto.

4. The defendants deny that said tract of land of 8,334 acres, or any part of it, belongs to plaintiffs, or any of them, or that they, or either of them, are entitled to possession thereof, or any part of it; and they deny that these defendants wrongfully or unlawfully entered upon said land, or any part thereof, or that they wrongfully withheld the possession of any part of it from plaintiffs.

5. Defendants deny that they claim to hold any part of said land under any patent subsequent in date to that of said Fleming.

6. The defendants further say that they are not acquainted with the bounds of said 8,334 acres of land set out in the plaintiffs' petition, and do not know whether said bounds embrace any part of the lands of these defendants, and they have no sufficient knowledge or information to form a belief upon that subject; but defend-
41 ants say that they are the owners and entitled to the possession of all such lands, and have lawful right to hold them against plaintiffs and all the world.

And defendants deny that they have endamaged the plaintiffs at all, and they pray to be dismissed, with their costs.

W. H. WADSWORTH AND
L. T. MOORE,
Counsel for Def'ts.

STATE OF KENTUCKY, *Boyd County:*

W. W. Culbertson, one of the defendants in the foregoing action, says: That the statements of the foregoing answer are true, as he believes.

W. W. CULBERTSON.

Sworn to by W. W. Culbertson, on this 6th day of November, 1877, before me, a notary public, in and for Boyd county, Kentucky.

Witness my hand and seal, this 6th day of November, 1877.

[SEAL.] A. H. GOBLE,
Notary Public in & for Boyd County, Kentucky.

And at a term of our said court held for its December term, 1877, and on a day of said term continued and held, to wit, on Wednesday, December 5th, A. D. 1877, the following order was made, viz:

42 KATE APPLEGATE and others

vs.

LEXINGTON & CARTER COUNTY MINING CO. *et al.*

This day come the defendants, by E. F. Dulin, Esq., and on his motion two packets of depositions, heretofore received by the clerk of this court, are ordered to be opened and filed.

And on another day of said term, continued and held, to wit, on Thursday, December 6th, A. D. 1877, the following order was made, viz:

KATE APPLEGATE *et al.*

vs.

LEXINGTON & CARTER COUNTY MINING CO. *et al.*

This day came the plaintiffs, by Messrs. W. W. Helm, W. T. Crutchfield, and D. W. Armstrong, their attorneys; came also the defendant, The Eastern Kentucky Railway Company, by E. F. Dulin, Esq., its attorney.

The plaintiffs, by their said attorneys, filed their amended petition herein, and, by consent, the answers heretofore filed are to be taken as the answers of the defendants to the said amended petition.

The defendant, The Eastern Kentucky Railway Company,
43 by its said attorney, filed its amended answer herein.

The plaintiffs, by their said attorneys, filed the reply of The Lexington and Carter County Mining Company, The Norton Iron Works, The Eastern Kentucky Railway Company, and Charles Corum.

By consent of parties, it is ordered that all parties have leave to file such amended and further pleadings herein, during vacation, as are necessary to make the joinder of issue herein.

By like consent this cause is continued until the first day of the next term of this court.

The amended petition above referred to is in the words and figures following, viz:

Amended Petition.

In the Circuit Court of the United States for the District of Kentucky, in the 6th Circuit.

Mrs. KATE APPLEGATE, &c.,

vs.

THE LEXINGTON & CARTER CO. MINING CO. & others.

The plaintiffs, amending their petition herein by leave of court, say that at the time of filing their said original petition they were misinformed as to the correct names of several of the defendants therein named, and that it is only since the filing of said
44 original petition that the plaintiffs have ascertained the correct names of said defendants: that the correct name of the defendant which in said original petition is styled "The Lexington and Carter County Railroad and Mining Company" is The Lexing-

ton and Carter County Mining Company; that the correct name of the defendant which in said original petition is styled "The Norton Iron Works Company" is The Norton Iron Works; that the correct name of the certain defendant which in said original petition is styled "The Hunnewell Furnace Company," or words to that effect, is The Eastern Kentucky Railroad Company; that the Buena Vista furnace is not claimed or operated by a corporation, but by a partnership, composed of W. W. Culbertson, Thos. W. Means, and K. R. Culbertson, who operate and carry on said furnace under the firm name of Culbertson, Means & Culbertson, and that the names of said Culbertson, Means & Culbertson should have been written in said original petition wherever the name of "The Buena Vista Furnace Company," or words to that effect, occur; that the aforesaid Lexington and Carter County Mining Company, Norton Iron Works, Eastern Kentucky Railway Company, and W. W. Culbertson, Thos. W. Means, and K. R. Culbertson, copartners as Culbertson, Means & Culbertson, are of those who have inflicted on the plaintiffs all and singular the wrongs and injuries set out in said original petition, and the plaintiffs hereby make said Lexington
45 and Carter County Mining Company, said Norton Iron Works, said Eastern Kentucky Railway Company, and said W. W. Culbertson, Thos. W. Means, and K. R. Culbertson, copartners as Culbertson, Means & Culbertson, defendants to this suit, and repeat as to them, and each of them, all the allegations in said original petition, except those which are in terms inapplicable to them, with the same force and effect as if said allegations were here again written.

The plaintiffs further say that Robert Glover and Mary, his wife, are also of those who have inflicted on the plaintiffs the wrongs and injuries set out in said original petition, and the plaintiffs hereby make said Robert Glover and Mary Glover, wife of said Robert, defendants in this suit, and hereby repeat as to them, and each of them, all and singular the allegations contained in said original petition, except those which are in terms inapplicable to them, with the same force and effect as if said allegations were here again written.

The plaintiffs pray against the parties hereby made defendants the same relief that is sought in said original petition.

W. W. Helm, being duly sworn, says: That he is one of the attorneys for the plaintiffs herein; all of whom are absent from the State of Kentucky, and that he believes the allegations contained in the foregoing petition to be true.

W. W. HELM.

46 Sworn to and subscribed before me by W. W. Helm, this 12th day of October, A. D. 1877.

W. F. B. HASTINGS,
U. S. Commissioner, Ky. District.

The amended answer of The Eastern Kentucky Railway Company above referred to is in the words and figures following, viz.

Amended Answer of the E. Ky. R. R., &c.

In the Circuit Court of the United States for the District of Kentucky.

KATE APPLEGATE *et al.*
vs.
THE LEXINGTON & CARTER CO. R. R., &c., &c.

1. This defendant, The Eastern Ky. Railway Company, says that it asks leave to correct a statement in its answer filed herein. When its answer was prepared the plaintiffs had not finished their survey, and defendant did not exactly know what lands they claimed. This defendant, supposing they claimed lands in Grayson claimed by defendant, set up in its answer a defence to the claim. This defendant has now ascertained that plaintiffs do not claim any land in Grayson now or at time suit brought, owned, claimed, and possessed by this defendant, and it corrects its said answer by the statement herein.

Wherefore, &c.

47 2. And for further amendment this defendant says: That it is in possession, claims, and owns lands outside of Grayson, within the alleged boundary of the Chas. Fleming, and the part thereof claimed by plaintiffs and for which they sue, which are (several hundred acres) covered and embraced by patents to Daniel Henry and Hugh Stewart, older and superior to the Charles Fleming 18,000; that all that is covered by the said Henry, def't claims and holds by titles from and under the Henry. All of the residue plaintiffs and those under whom and through whom it claims and holds have for 15 years, and even for 30 years, and are held, claimed, and owned by actual and continued occupancy by themselves and tenants adverse to the world, claiming the same as their property.

Wherefore as to this it pleads the statute of limitations of K'y of 15 years and of 30 years in bar of plaintiffs suit, wherefore, &c.

"DULIN, *Att'y.*"

In the United States Circuit Court for the K'y District.

H. W. BATES, being duly sworn, on oath says: That he is the vice-president of the defendant, The E. K'y Railway Co., a corporation, and is managing agent of the same: that the president is a non-resident of and absent from K'y, and that the allegations
48 contained in this amended answer are, to the best of his knowledge, information, and belief are true.

H. W. BATES.

Sworn to and subscribed to by H. W. Bates before me, this 6th day of Dec., 1877.

H. BOSTWICK, *Clerk.*

Reply to answer of defendant, The Lexington & Carter County Mining Company, above referred to, is in the words and figures following, to wit:

Reply to Answer of Lex. & Carter Co. Mining Co.

In the Circuit Court of the United States for the District of Kentucky, in the 6th Circuit.

Mrs. KATE APPLEGATE & others
vs.
THE LEXINGTON & CARTER COUNTY MINING COMPANY and others.

1. The plaintiffs for reply to the sixth paragraph of the answer of The Lexington and Carter County Mining Company, one of the defendants herein, say that they have no knowledge or information sufficient to form a belief, whether or not, on the 30th day of October, A. D. 1783, or at any other time, an entry of any portion of the land in controversy herein was made in the name of William Grayson; or whether or not any such entry was ever made or filed in the proper surveyor's office or elsewhere as provided by law; or whether said entry was surveyed on the 2nd day of December, A. D. 1785,
49 or at any other time; or whether or not on the 25th day of June, A. D. 1795, or at any other time, said entry was carried into grant, and they deny that by reason of the alleged entry and survey of said Grayson, or for any other reason whatever, the entry, survey, and patent or either of them, of said Charles Fleming are void, and deny that the alleged patent or grant to Grayson is the oldest or paramount title to the land in controversy herein, or to any part thereof.

2. For reply to the seventh paragraph of said answer, the plaintiffs deny that the said defendant, or those from, through, or under whom it claims have, for thirty years next preceding the institution of this suit, claimed, held, or occupied any portion of the land in controversy herein, by cultivation, improvement, occupancy, or otherwise, by themselves or their tenants, within regular marked or defined boundaries; deny that the said defendant, or those through, from, or under whom it claims have claimed or held any portion of said land continuously or adversely to the plaintiffs for thirty years next preceding the institution of this suit; and deny that the said defendants, or those through, from, or under whom it claims, have ever claimed any portion of said land within or to the extent of any regular, marked, or defined boundary.

50 W. W. Helm, being duly sworn, says, on his oath: That he is one of the attorneys for the plaintiffs herein, all of whom are absent from the State of Kentucky, and that the allegations contained in the foregoing reply are true, to the best of his knowledge, information and belief.

W. W. HELM.

Sworn and subscribed before me by W. W. Helm, this 6th day of December, A. D. 1877.

H. BOSTWICK, *Clerk.*

The reply to the answer of the Norton Iron Works above referred to, is in the words and figures following, to wit:

Reply to the Answer of the Norton Iron Works.

In the Circuit Court of the United States for the District of Kentucky, in the 6th Circuit.

Mrs. KATE APPLEGATE & OTHERS

vs.

THE LEXINGTON & CARTER COUNTY MINING COMPANY & others.

1. The plaintiffs, for reply to the third paragraph of the answer of the Norton Iron Works, one of the defendants herein, say that they have no knowledge nor information sufficient to form a belief whether or not a patent for any portion of the land in controversy herein, and claimed by the said defendant, was ever issued to Col. William Grayson, or whether the said defendant has ever
51 been, or is now, vested with the alleged or pretended title of said Grayson; they deny that the said defendant, or those from or under whom it claims, have, by tenants or otherwise, by residence, cultivation, improvement, or possession under said Grayson patent, or otherwise, or to a marked or well-defined boundary, claimed or held any portion of the land in controvecsy herein continuously for thirty years adversely to the plaintiffs, or to those under whom the plaintiffs claim.

2. And for reply to the fourth paragraph of said answer they deny that the entry and survey, or either of them, on which the alleged patent to Grayson issued, are older than or superior to the entry and survey, or either of them, on which the patent to Charles Fleming issued. Deny that the alleged title under said Grayson patent passed an equity older than or superior to that of said Fleming, in virtue of the entry and survey on wnich it issued, or for any other reason; and deny that the alleged patent to said Grayson passed a superior title to that which passed and vested under the patent to Charles Fleming.

W. W. Helm, being duly sworn, says, on his oath, that he is one of the attorneys for the plaintiffs, all of whom are absent from the State of Kantucky, and that the allegations contained in the foregoing reply are true, to the best of his knowledge, information, and belief.

W. W. HELM.

52 Sworn to and subscribed before me, by W. W. Helm, this 6th day of December, A. D. 1877.

H. BOSTWICK, *Clerk.*

The reply to answer of defendant, The Eastern Kentucky Railway Company, above referred to, is in the words and figures following, viz:

Reply to Answer of the Eastern K'y R. R. Co.

In the Circuit Court of the United States, for the District of Kentucky, in the 6th Circuit.

Mrs. KATE APPLEGATE & others
vs.
THE LEXINGTON & CARTER COUNTY MINING COMPANY & others.

1. The plaintiffs, for reply to the answer of The Eastern Kentucky Railway Company, one of the defendants herein, say that they have no knowledge nor information sufficient to form a belief whether or not any portion of the land in controversy in this suit, and occupied by the said defendant, is covered by or included in or under the alleged entry, survey, or patent of Daniel Henry. They deny that said alleged entry, survey, and patent are, or that either of them is, older or superior to those or that of Charles Fleming, under which the plaintiffs claim.

2. And, for reply to the seventh paragraph of said answer, the plaintiffs say that they have no knowledge nor information
53 sufficient to form a belief whether or not any portion of the land in controversy in this suit, and occupied by the said defendant, is covered by or included in or under the alleged entry, survey, and patent of Hugh Stewart and Ann Stewart, or of either of them. They deny that said alleged entries, surveys, and patents, or either of them, of said Hugh Stewart and Ann Stewart, or of either of them, are older than or superior to that or those of Charles Fleming, under whom the plaintiffs claim.

3. And, for reply to the eighth paragraph of said answer, the plaintiffs say that they have no knowledge nor information sufficient to form a belief, whether any portion of the land in controversy in this suit, and occupied by the said defendant, is covered by or included in or under the alleged entry, survey, and patent of William Grayson. They deny that on the 30th day of October, A. D. 1783, or at any time before the right and title of said Charles Fleming attached to said land, an entry of any portion thereof in the name of said Grayson, or of any other person, was made in the proper surveyor's office or elsewhere; deny that on the 2d day of December, A. D. 1785, or at any time prior to the attaching and completion of the right and title of said Charles Fleming thereto, any portion of said land was surveyed in behalf of said Grayson, or any other person; deny that on the 25th day of June, A. D. 1795, the alleged survey of said Grayson was carried into grant and
54 a patent issued therefor; deny that the alleged entry and survey of said Grayson are, or that either of them is, older or better than the entry, survey, and patent, or either of them, of said Charles Fleming; and deny that for said reason, or any other, the entry, survey, and patent of said Fleming are, or that either of them is, void.

4. And, for reply to the ninth paragraph of said answer, the plaintiffs deny that the said defendant, or those from or under whom it claims have by occupancy, possession, cultivation, or improve-

ment, within regular or defined boundaries, and to the extent of said boundaries or otherwise, continuously for thirty years next before the institution of this suit held any portion of the land in controversy herein, and deny that the said defendant, or those from or under whom it claims have continuously for thirty years next preceding the institution of this suit claimed any portion of said land adversely to the plaintiffs.

W. W. Helm, being duly sworn, says on his oath: That he is one of the attorneys for the plaintiffs herein, all of whom are absent from the State of Kentucky, and that the allegations contained in the foregoing reply are true, to the best of his knowledge, information, and belief.

W. W. HELM.

55 Sworn to and subscribed before me, by W. W. Helm, this 6th day of December, A. D. 1877.

H. BOSTWICK, *Clerk.*

The reply to answer of Charles Corum, above referred to, is in the words and figures following, to wit:

Reply to the Answer of Chas. Corum.

In the Circuit Court of the United States for the District of Kentucky, in the 6th Circuit.

MRS. KATE APPLEGATE & others
vs.
THE LEXINGTON & CARTER COUNTY MINING COMPANY & others.

1. The plaintiffs, for reply to the third paragraph of the answer filed herein by the defendant, Charles Corum, in his own behalf, and in behalf of the defendants, Moses Adams, W. H. Wadsworth, and James Carroway, say that they have no knowledge nor information sufficient to form a belief whether or not the four hundred and seventy-eight (478) acres of land referred to in said answer are embraced within or covered by the patent alleged to have been issued to Daniel Henry.

They deny that the alleged entry, survey, and patent to said Henry are, or that either of them is, older than the entry and survey, or either of them, under which the plaintiffs claim; and they deny that the lands which said Corum detains, or which said
56 other defendants detain, from the plaintiffs are rightfully his or theirs. They have no knowledge nor information sufficient to form a belief whether or not said Corum and said other defendants hold title to any portion of said land by a regular chain of title from the above-named Daniel Henry.

2. And, for reply to the fourth paragraph of said answer, they deny that said Corum or said other defendants, or any of them, or those through or under whom he, or they, or any of them claim, have had possession of any portion of the land in controversy herein, by improvement, cultivation, or occupancy, or claiming to regu-

lar defined and marked boundaries, for thirty years next preceding the insitution of this suit; and they deny that said Corum, or said other defendants, or any of them, or those through whom he, or they, or any of them, claim, have continuously for thirty years next preceding the institution of this suit, claimed said lands, or any part thereof, adversely to the plaintiffs to the extent of any marked, fixed, or well defined bouudary thereof.

W. W. Helm, being duly sworn, says, on his oath, that he is one of the attorneys for the plaintiffs herein, all of whom are absent from the State of Kentucky, and that the allegations con-
57 tained in the foregoing reply are true, to the best of his knowledge, information, and belief.

W. W. HELM.

Sworn to and subscribed before me by W. W. Helm, this 6th day of December, 1877.

H. BOSTWICK, *Clerk.*

And at a term of our said court, held for its December term, 1878, and on a day of said term continued and held, to wit, on Wednesday, December 4th, A. D. 1878, the following order was made, viz:

KATE APPLEGATE, &c.,
vs.
THE LEXINGTON & CARTER CO. MINING CO. *et al.*

This day came the plaintiffs, by their attorneys, and filed their stipulation for costs herein, with William E. Applegate as surety therefor, which is accepted and approved by the court. And thereupon the plaintiffs tendered and offered to file their several amended replies to the separate answers of the defendants, The Lexington and Carter County Mining Company, The Eastern Kentucky Railway Company, and The Norton Iron Works, to the filing of which amended replies the said defendants objected; and the court being sufficiently advised it is thereupon ordered that said objection be overruled and that said amended replies be filed, which is
58 hereby done. The said plaintiffs, by their said attorneys, moved to exclude the depositions of G. W. Long, William Robertson, Alfred D. Vore, Mrs. Sophia Carter, Frank Fairburn, William Hord, Adam McWhorter, James Hall, Henry Gee, W. W. Culbertson, and M. H. Young, heretofore taken in behalf of the defendants and filed herein, and the said plaintiffs filed herein their written exceptions to said depositions, and the defendants thereupon, by their attorneys, consented and agreed that if the said plaintiffs would waive their said objections and withdraw their said motion, plaintiffs should have leave to cross-examine said witnesses, which is hereby granted; and said defendants thereupon also agreed, in consideration of the waiver of said objection and the withdrawal of said motion, to produce said witnesses for cross-examination at any time on reasonable notice in that behalf, which the said defendants are hereby ordered to do; and said objection and motion are withdrawn as to such of said witnesses as may be so produced for cross-

examination; and said cross-examination is to be at the costs of the plaintiffs in the first instance, said costs to be taxed against the defeated party on determination of the cause. Thereupon the plaintiffs filed the affidavits of Mrs. Kate Applegate and D. W. Armstrong, and moved that this cause be continued to the next term of
59 this court. And the court being sufficiently advised said motion is sustained, and said cause is hereby continued accordingly. It is ordered, however, that the costs of this term be paid by plaintiffs, including an attorney's fee of one hundred dollars ($100.00), to the attorneys of the defendants. By consent of parties, it is ordered that the aforesaid amended replies be taken and considered as traversed of record.

The amended reply of the Lexington and Carter County Mining Company, above referred to, is in the words and figures following, to wit:

Amended Reply.

In the Circuit Court of the United States for the District of Kentucky, in the 6th Circuit.

Mrs. Kate Applegate, &c.,
vs.
The Lexington & Carter County Mining Company and others.

1. The plaintiffs, amending their reply to the answer of the defendant, The Lexington and Carter County Mining Company, say that said company was incorporated by and under an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to charter the Lexington and Carter County Mining Company," which became a law on the 3rd day of March, A. D. 1869, and by or under no other act or acts whatever; that so much of the
60 land here in controversy and belonging to the plaintiffs, as is claimed by said corporation, is claimed by it under certain clauses and provisions of the aforesaid act of incorporation, which purport and attempt to confer on said Lexington and Carter County Mining Company the right and power to cut, saw, sell, and deal in lumber and timber, and to do other acts and things not expressed in the title of said act of incorporation, nor incident to the right to open and operate mines; that the alleged occupancy and possession by the said defendant corporation of the lands here in controversy, in so far as any such occupancy or possession ever existed, did not occur and were not done under or in pursuance of the right of said corporation to open and operate mines, nor under in pursuance of any right properly incident thereto, but said occupancy and possession occurred and were done under and in pursuance of the pretended power of said corporation to cut, saw, and deal in lumber and timber, and to do other acts and things not expressed in the title of the aforesaid act of incorporation, nor incident to any right or power expressed therein; and that said occupancy and possession by the said corporation were unconstitutional, illegal, and void, and conferred no right or title on the said defendant as against these plaintiffs.

2. For further reply to said answer the plaintiffs say that their said ancestor, Cary L. Clark, departed this life prior to the
61 year A. D. 1835; that at the time of his decease the plaintiffs, Mrs. Kate Applegate, Mrs. Charlotte Hollingsworth, and Miss Harriet B. Clark, and James Clark, the father of the plaintiff, James Clark, were all infants, under the age of twenty-one years; that in the year A. D. 1835 the plaintiff, Mrs. Kate Applegate, while still under the age of twenty-one years, was married to the plaintiff, Wm. Applegate, and continuously from said date she has been, and she still is, a married woman; that in the year A. D. 1838 the plaintiff, Mrs. Charlotte Hollingsworth, became a married woman, and continuously from said date to a time within less than three years next preceding the beginning of this action she remained and was a married woman; that the plaintiff, James Clark, was born in the year A. D. 1841, and that his father departed this life in the year A. D. 1866; that at the time of the death of the aforesaid Cary L. Clark neither the said defendant, nor any one through or under whom it claimed, had or held possession or occupancy of the tract of land here in controversy, nor of any part thereof, within fixed boundaries or otherwise; that neither at the time of the marriage of the said Mrs. Kate Applegate, nor at the time of the marriage of Mrs. Charlotte Hollingsworth, did the said defendant, or any one through or under whom it claims, have or hold possession or occupancy of the tract of land here in controversy, or of any part
62 thereof, within fixed boundaries or otherwise, and that any possession or occupancy of said tract of land, or of any part thereof, by the said defendant, or by any one through or under whom it claims, began and has wholly taken place during the coverture of said Mrs. Kate Applegate, and during and since the coverture of Mrs. Charlotte Hollingsworth.

3. Further replying to said answer, the plaintiffs say that during the entire period of the late war, commonly known as the war of the rebellion, the plaintiffs, Wm. Applegate, Mrs. Kate Applegate, Miss Harriet B. Clark, and James Clark, and also James Clark, the father of the plaintiff, James Clark, resided and were within the limits of the so-called Confederate States, and also within the military lines of the so-called Confederates, and were citizens as before alleged; and the plaintiffs pray that said yeriod be not reckoned or included in the period of time prescribed by statute for the barring of their rights.

4. For a further reply to said answer the plaintiffs deny that the said defendants, or those through or under whom it claims, has had or held possession or occupancy of said tract of land, or of any part thereof, adversely to the plaintiffs, continuously for the period of fifteen years next preceding the institutiou of this suit.

5. For a further reply to said answer the plaintiffs deny that the said defendant, or those through or under whom it
63 claims, has had an actual occupancy of the tract of land here in controversy, or of any part thereof, by settlement thereon, for the period of seven years next preceding the beginning of this

action, under a connected title thereto, in law or in equity, deducible of record, from the Commonwealth.

The plaintiffs pray as in their former pleadings they have prayed.

Mrs. Kate Applegate says that the allegations contained in the foregoing amended reply are true, to the best of her knowledge, information, and belief.

KATE C. APPLEGATE.

Sworn to and subscribed before me by Mrs. Kate Applegate, this 2d day of December, A. D. 1878.

[SEAL.] FINNELL D. MADEIRA,
Notary Public, Kenton Co.

The amended reply of the Eastern Kentucky Railway Company, above referred to, is in the words and figures following, to wit:

Amended Reply.

In the Circuit Court of the United States for the District of Kentucky, in the 6th Circ't.

MRS. KATE APPLEGATE, &c.,
vs.
THE LEXINGTON & CARTER COUNTY MINING COMPANY and others.

64 1. The plaintiffs, amending their reply to the answer and amended answer of the defendant, The Eastern Kentucky Railway Company, say that the said Eastern Kentucky Railway Company was incorporated by and under an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Eastern Kentucky Railway Company," which became a law on the 18th day of January, A. D. 1870, and by or under no other act or acts whatever; that so much of the land here in controversy, and belonging to the plaintiffs, as is claimed by said corporation, is claimed by it under certain clauses and provisions of the aforesaid act of incorporation, which purport and attempt to confer on said Eastern Kentucky Railway Company the right and power to open and operate mines and to do other acts and things not expressed in the title of said act of incorporation, nor incident to the right to construct and operate a railway; that the alleged occupancy and possession by the said defendant corporation of the lands here in controversy, in so far as any such occupancy or possession ever existed, did not occur and were not done under or in pursuance of the right of said corporation to build and operate a railway, nor under or in pursuance of any right properly incident thereto; but said occupancy and possession occurred and were done

65 under and in pursuance of the pretended power of said corporation to open and operate mines and to do other acts and things not expressed in the title of the aforesaid act of incorporation, nor incident to any right or power expressed therein; and that said occupancy and possession by said corporation were unconstitutional, illegal, and void, and conferred no right or title on the said defendant as against the plaintiffs.

2. For further reply to said answer the plaintiffs say that their said ancestor, Cary L. Clark, departed this life prior to the year A. D. 1835; that at the time of his decease the plaintiffs, Mrs. Kate Applegate, Mrs. Charlotte Hollingsworth, and Miss Harriet B. Clark, and James Clark, the father of the plaintiff, James Clark, were all infants under the age of twenty-one years; that in the year A. D. 1835, the plaintiff, Mrs. Kate Applegate, while still under the age of twenty-one years, was married to the plaintiff, Wm. Applegate, and continuously from said date she has been, and she still is, a married woman; that in the year A. D. 1838, the plaintiff, Mrs. Charlotte Hollingsworth, became a married woman, and continuously from said date to a time within less than three years next preceeding the beginning of this action she remained and was a married woman; that the plaintiff, James Clark, was born in the year A. D. 1841, and that his father departed this life in the year A. D. 1866; that at the time of the death of the aforesaid Cary L. Clark, neither the said defendant nor any one through or
66 under whom it claimed, had or held possession or occupancy of the tract of land here in controversy, nor of any part thereof, within fixed boundaries or otherwise; that neither at the time of the marriage of the said Mrs. Kate Applegate, nor at the time of the marriage of Mrs. Charlotte Hollingsworth, did the said defendant, or any one through or under whom it claims, have or hold possession or occupancy of the tract of land here in controversy, or of any part thereof, within fixed boundaries or otherwise; and that any possession or occupancy of said tract of land, or of any part thereof by the said defendant, or by any one through or under whom it claims, began and has wholly taken place during the coverture of said Mrs. Kate Applegate, and during and since the coverture of Mrs. Charlotte Hollingsworth.

3. Further replying to said answer, the plaintiffs say that during the entire period of the late war, commonly known as the war of the rebellion, the plaintiffs Wm. Applegate, Mrs. Kate Applegate, Miss Harriet B. Clark, and James Clark, and also James Clark, the father of James Clark, resided and were within the limits of the so-called Confederate States, and also within the military lines of the so-called Confederates, and were citizens as before alleged; and the plaintiffs pray that said period be not reckoned or included in the period of time prescribed by statute for the barring of their rights.

67 4. For a further reply to said answer the plaintiffs deny that the said defendant, or those through or under whom it claims, has had or held possession or occupancy of said tract of land, or of any part thereof, adversely to the plaintiffs, continuously for the period of fifteen years next preceeding the institution of this suit.

5. For a further reply to said answer the plaintiffs deny that the said defendant, or those through or under whom it claims, has had an actual occupancy of the tract of land here in controversy, or of any part thereof by settlement thereon, for the period of seven years next preceding the beginning of this action, under a connected title

thereto in law or in equity, deducible of record from the Commonwealth.

The plaintiffs pray as in their former pleadings they have prayed.

Mrs. Kate Applegate says that the allegations contained in the foregoing amended reply are true to the best of her knowledge, information, and belief.

KATE C. APPLEGATE.

Sworn to and subscribed before me, by Mrs. Kate C. Applegate, this 2nd day of December, A. D. 1878.

[SEAL.] FINNELL D. MADEIRA,
Notary Public, Kenton Co.

68 The amended reply of the Norton Iron Works above referred to is in the words and figures following, to wit:

Amended Reply.

In the Circuit Court of the United States for the District of Kentucky, in the 6th Circuit.

MRS. KATE APPLEGATE, &c.,
vs.
THE LEXINGTON AND CARTER COUNTY MINING COMPANY and others.

1. The plaintiffs, amending their reply to the answer of the defendant, The Norton Iron Works, say that the said Norton Iron Works was incorporated by and under an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act for the benefit of and to reincorporate the Norton Iron Works," which became a law on the 6th day of February, A. D. 1873; that so much of the land here in controversy and belonging to the plaintiffs, as is claimed by said corporation, is claimed by it under certain clauses and provisions of the aforesaid act of incorporation & which purport and attempt to confer on said Norton Iron Works the right and power to buy, sell, and deal in real estate generally, and to do other acts and things not expressed in the title of said act of incorporation, nor incident to the right to manufacture iron; that the alleged occupancy or possession, so far as any ever existed, did not occur and were not done under or in pursuance of the right
69 of said corporation to manufacture iron, nor under or in pursuance of any right properly incident thereto, but said occupancy and possession occurred and were done under and in pursuance of the pretended power of said corporation to buy, sell, and deal in real estate generally, and to do other acts and things not expressed in the title of the aforesaid act of incorporation, nor incident to any right or power expressed therein; and that said occupancy and possession by the said corporation was unconstitutional, illegal, and void, and conferred no right or title on the said defendant as against these plaintiffs.

2. For further reply to said answer the plaintiffs say that their said ancestor, Cary L. Clark, departed this life prior to the year A. D. 1835; that, at the time of his decease, the plaintiffs, Mrs. Kate

Applegate. Mrs. Charlotte Hollingsworth, and Miss Harriet B. Clark, and James Clark, the father of the plaintiff, James Clark, were all infants under the age of twenty-one years; that, in the year A. D. 1835, the plaintiff, Mrs. Kate Applegate, while still under the age of twenty-one years, was married to the plaintiff, Wm. Applegate, and continuously from said date she has been, and she still is, a married woman; that, in the year A. D. 1838, the plaintiff, Mrs. Charlotte Hollingsworth, became a married woman, and continuously from said date to a time within less than three years next preceeding the beginning of this action, she remained and
70 was a married woman; that the plaintiff, James Clark, was born in the year A. D. 1841, and that his father departed this life in the year A. D. 1866; that, at the time of the death of the aforesaid Cary L. Clark, neither the said defendant, nor any one through or under whom it claimed, had or held possession or occupancy of the tract of land here in controversy, nor any part thereof, within fixed boundaries or otherwise; that neither at the time of the marriage of the said Mrs. Kate Applegate, nor at the time of the marriage of Mrs. Charlotte Hollingsworth, did the said defendant or any one through or under whom it claims, have or hold possession or occupancy of the tract of land here in controversy, or of any part thereof, within fixed boundaries or otherwise; and that any possession or occupancy of said tract of land or of any part thereof, by the said defendant, or by any one through or under whom it claims, began and has wholly taken place during the coverture of said Mrs. Applegate, and during and since the coverture of Mrs. Charlotte Hollingsworth.

3. Further replying to said answer, the plaintiffs say that during the entire period of the late war, commonly known as the war of the rebellion, the plaintiffs, Wm. Applegate, Mrs. Kate Applegate, Miss Harriet B. Clark, and James Clark, and also James Clark, the father of James Clark, resided within the limits of the so-called
71 Confederate States, and also within the military lines of the so-called Confederates, and were citizens as above alleged; and the plaintiffs pray that said period of time be not reckoned in the time prescribed by the statute for the barring of their rights.

4. For a further reply to said answer the plaintiffs deny that the said defendant, or those through or under whom it claims, has had or held possession or occupancy of said tract of land, or of any part thereof, adversely to the plaintiffs, continuously for the period of fifteen years next preceeding the institution of this suit.

5. For a further reply to said answer the plaintiffs deny that the said defendant, or those through or under whom it claims, has had an actual occupancy of the tract of land here in controversy, or of any part thereof by settlement thereon for the period of seven years next preceeding the beginning of this action, under a connected title thereto, in law or in equity, deducible of record from the Commonwealth.

The plaintiffs pray as in their former pleadings they have prayed.

Mrs. Kate Appelgate says: That the allegations contained in the foregoing amended reply are true to the best of her knowledge, information, and belief. KATE C. APPLEGATE.

72 Sworn to and subscribed before me by Mrs. Kate Applegate, this 2nd day of December, A. D. 1878.

[SEAL.] FINNELL D. MADEIRA,
Notary Public, Kenton Co., Ky.

The affidavit of Mrs. Kate Applegate, above referred to, is in the words and figures following, to wit:

Affidavit of Mrs. Kate Applegate.

In the Circuit Court of the United States for the District of Kentucky, in the 6th Circuit.

MRS. KATE APPLEGATE, &C.,
vs.
THE LEXINGTON & CARTER COUNTY MINING COMPANY and others.

Mrs. Kate Applegate, being duly sworn, says on her oath: That she is the same Mrs. Kate Applegate who is one of the plaintiffs in the above above entitled cause; that she has been the most active of the said plaintiffs in the preparation and prosecution of said suit, and has had and now has the control and management of the same in behalf of herself and her co-plaintiffs; that she and the counsel for the plaintiffs, by her direction, have used very unusual and the utmost possible diligence in the endeavor to get said cause ready for trial at the earliest practicable moment, and especially at the present term of this court, and to complete the evi-
73 dence of the chain of the plaintiffs' title, from the original patentee of the land in controversy, with a view to such title; that for some time past said chain of title has been complete, with the exception of a single transfer from Charles Fleming, the original patentee thereof, for a portion of said tract of land; that said transfer took place more than eighty years ago, and for a long time, though the most diligent search for the same was made, the proper legal evidence or movement thereof could not be found; that the difficulty of finding said evidence or record arose from the fact that at the time said land was patented to said Charles Fleming, and for some months thereafter, the present Commonwealth of Kentucky was a part of the Commonwealth of Virginia, and from the further fact that in the course of the history of said Commonwealth of Kentucky the county or counties in which said tract of land lies has been successively within the limits of several different counties with county-seats and officers for the recording of conveyances of land in several different and widely separated towns, extending from Lexington to Greenupsburg, and from the further fact that at — early day in the history of Kentucky there was a statute in force which permitted the recording af conveyances of land in the office of the clerk of the court of appeals, at Frankfort, and
74 many such conveyances were so recorded, and from the further fact that the older or early records embracing the period at which said transfer from Charles Fleming was made, including both such records as were made at Lexington, and such as

were made and kept at Frankfort, were almost all destroyed by fire, and from the further fact that such remains or fragments of said records as had been saved were in a very disordered state and unsystematized; that by telegrams, letters, journeys in person, and every other practicable means the affiant and said attorneys, at heavy expense, made and caused to be made the most diligent search for the record of said missing transfer from Charles Fleming, and she and they were unable to find it or to have it found at Frankfort, at Lexington, at Paris, at Versailles, at Maysville, at Greenupsburg, or elsewhere; that especially were repeated search and inquiry made at Frankfort among the remains of the records in the office of the clerk of the court of appeals, and of and from the custodian of said records, for any record or proper legal evidence of said transfer; that said reported search and inquiry failed to disclose any record or evidence of said transfer, and affiant and said attorneys were assured by the custodian of said records that none existed; that it was not until the day before yesterday, to wit, December 2nd, A. D. 1878, that the record of said transfer from
75 Charles Fleming was found; that on said last-named day one of the attorneys for the plaintiffs, on making still another and final search among the remains of the aforesaid records at Frankfort, found there the record of a transfer and conveyance of said portion of said tract of land from William Fleming, John Bernard, and Richard Bernard, devisees of said Charles Fleming, and Charles Marshall, by William Marshall, his attorney-in-fact, to grantees, from and under whom the plaintiffs claim by regular chain of title; that in said last-named conveyance it is recited, and affiant believes, that the last will of said Charles Fleming, under and by authority of which said conveyance was made, was then of record in the courts of Chesterfield county, Virginia; that the affiant and said counsel forthwith telegraphed to the officer having the custody of records of wills at the court-house of said Chesterfield county, inquiring whether the record of said will was still in existence there, and ordering a copy of the same, but that no answer to said telegram and no copy of said will has yet been received; that affiant is confident that if this cause shall be continued she will be able, by the next term of this court, to obtain properly certified copies of said will of Charles Fleming and of the power of attorney of Charles Marshall to
76 William, thereby showing that the grantors in the deed last aforesaid were fully authorized and empowered to convey the aforesaid balance of the tract of land here in controversy, which is thereby conveyed; that affiant is very desirous to bring this cause to trial at the next term of this court, and is quite willing to be put on terms so to do.

KATE M. APPLEGATE.

Subscribed and sworn to by Kate M. Applegate before me, a notary public for Kenton county, this the 4th day of December, 1878.

[SEAL.] RICHARD H. GRAY,
Notary Public for Kenton Co., Ky.

The affidavit of D. W. Armstrong, above referred to, is in the words and figures following, to wit:

Affidavit of D. W. Armstrong.

In the Circuit Court of the United States for the District of Kentucky, in the 6th Circuit.

Mrs. KATE APPLEGATE, &c.,
vs.
THE LEXINGTON & CARTER COUNTY MINING COMPANY and others.

D. W. Armstrong, being duly sworn, says, on his oath: That he is one of the attorneys for the plaintiffs in the above-entitled cause; that he has read the affidavit of Mrs. Kate Applegate this day
77 filed in said cause, showing grounds for a continuance, and that the statements contained in said affidavit are true.

D. W. ARMSTRONG.

Sworn to before me, this 4th December, 1878.

H. BOSTWICK, *Clerk.*

78 At a term of our said court, held for its April term, 1879, and on a day of said term continued and held, to wit, on Thursday, May 15th, A. D. 1879, the following order was made, viz:

KATE APPLEGATE *et al.*
vs.
LEX. & CARTER COUNTY MINING AND R. R. CO., &c.

This day came the plaintiffs, by their attorneys, Armstrong & Helm; came also the defendants, by their attorneys, Wadsworth & Dulin.

On motion of the plaintiffs the 2nd paragraph of the petition is dismissed without prejudice.

Wherefore, to try the issue joined, let a jury come. And thereupon came the following jury, to wit: Augustus Haven, Geo. T. Gaines, Jas. H. Poor, H. L. Blase, E. D. Chapin, B. A. Sleet, J. M. Chenoweth, Pat. H. Wilson, Jas. M. Blackburn, Jas. S. McLean, J. T. Williams, and H. C. Bruce, who were elected, tried, and sworn well and truly to try the issue joined, and a true verdict render according to the law and evidence. The evidence was heard in part, but there not being time to conclude, the cause and jury are continued until to-morrow morning at ten o'clock.

79 And on another day of said term, continued and held, to wit, on Saturday, May 17th, A. D. 1879, the following order was made, viz:

KATE APPLEGATE *et al.*
vs.
LEX. AND CARTER COUNTY MINING CO., &c.

This day came the same parties and jury, as on May 15th, and the

court instructed the jury to find for defendants as in case of a nonsuit.

Thereupon the jury returned into court the following verdict, to wit:

"We, the jury, find for the defendants.

"H. C. BRUCE, *Foreman.*"

It is therefore considered by the court that the defendants go hence and recover of plaintiffs their costs in this behalf expended.

The plaintiffs, Kate Applegate and others, move the court to set aside the verdict rendered herein and judgment thereon, and to grant them a new trial, and, for grounds of said motion, say:

First. That the court erred in instructing the jury to find for the defendants as in case of nonsuit.

Second. That the court erred in ruling that the copy of the
80 assignment by Samuel Sacket to Cary L. Clarke of the mortgage executed to said Sackett by Conkling and others was not competent evidence in behalf of the plaintiffs to prove the fact of said assignment.

D. W. ARMSTRONG,
N. T. CRUTCHFIELD,
W. W. HELM,
Att'ys for Plaintiffs.

And on another day continued and held, to wit, on Monday, May 19th, A. D. 1879, the following order was made, viz:

KATE APPELGATE *et als.*
vs.
LEX. AND CARTER COUNTY MINING CO. *et al.*

This day came the plaintiffs, by their attorneys, Helm and Armtrong, and filed their bill of exceptions, duly signed by the judge, which is made part of the record.

And at a special term of our said court, held Saturday, February 14th, A. D. 1880, the following order was made, viz:

KATE APPLEGATE *et al.*
vs.
LEX. & CARTER CO. R. R. AND MINING CO.

81 This cause came on to be heard upon plaintiffs' motion to set aside the judgment of nonsuit heretofore entered herein, and to grant them a new trial; and said motion having been argued by counsel, and the court now being sufficiently advised—

It is considered by the court that said motion be, and the same is hereby, sustained, and the judgment of nonsuit entered herein on the 17th day of May, A. D. 1879, is set aside, and a new trial is granted.

At a term of our said court, held for its April term, 1880, and on a day of said term continued and held, to wit, on Monday, May 10th, A. D. 1880, the following order was made, viz:

KATE APPLEGATE *et al.*,
vs.
LEX. & CARTER COUNTY MINING CO. *et al.*

This day came the plaintiffs herein, by D. W. Armstrong, their attorney, and filed affidavits herein, and on his motion a spa. "*duces tecum*" is awarded for the clerk of the Greenup circuit and county courts to bring into this court certain books and papers now in his custody as said clerk.

82 And on another day continued and held, to wit, on Tuesday, May 11th, A. D. 1880, the following order was made, viz:

KATE APPLEGATE *et al.*
vs.
LEX. & CARTER COUNTY R. R. & MINING CO. *et al.*

This day came the defendants by their attorneys, and filed their motion to set aside the order granting plaintiffs a spa. "*duces tecum*," entered on the 10th inst.

The court heard the arguments of counsel on said motion, and being sufficiently advised thereof, it seems to the court that the law is for the plaintiffs; it is therefore considered by the court that said motion be, and the same is, hereby overruled.

And on another day continued and held, to wit, on Wednesday, May 12th, A. D. 1880, the following order was made, viz:

KATE APPLEGATE *et al.*
vs.
LEX. & CARTER CO. MINING CO. *et al.*

This day came the defendants by E. F. Dulin, Esq., and John F. Hagar, Esq., their attorneys, and filed the affidavits of John
83 Russell, one of the defendants herein; also statement of Hon. W. C. Ireland, Esq., and on motion of defendants and plaintiffs consenting, by their attorneys, it is ordered that plaintiffs shall shall have the right to cross-examine the witnesses Wm. Robertson, Wm. Hood, and G. W. Long, upon giving to defendants reasonable notice of the time and place of the same, as directed in the order of Dec. 4th, 1878, made in this case, and in case of the failure of plaintiffs to require the production of witnesses upon reasonable notice at the time of trial, said exceptions taken by defendants to the depositions of said witnesses shall stand overruled.

On motion of defendants it is ordered that this case be postponed until the second Tuesday (10th day) of August next. It is thereupon adjudged that plaintiffs recover against defendants their costs at this term expended, and it is ordered, on motion of defendants, that this judgment for costs be set off against judgments for costs heretofore rendered in their favor against plaintiffs.

And on another day continued and held, to wit, on Thursday, May 13th, A. D. 1880, the following order was made, viz:

84 KATE APPLEGATE *et al.*

vs.

LEX. & CARTER COUNTY R. R. AND MINING CO., &c.

This day came the plaintiffs, by D. W. Armstrong, Esq., their attorney, and filed affidavit herein, and on their motion a spa. "*deucus tecum*" is awarded, requiring the clerk of the Greenup circuit and county courts to bring into this court certain books and papers now in his custody as clerk of said courts.

And on another day continued and held, to wit, on Tuesday, August 10th, A. D. 1880, the following order was made, viz:

KATE APPLEGATE *et al. vs.* LEX. & CARTER COUNTY MINING CO., &c.

This day came the plaintiffs, by their attorneys; came also the defendants, by their attorneys.

Wherefore, to try the issue joined, it is ordered that a jury come, and thereupon came a jury, to wit, Walton Craig, Jr., Richard Evans, I. W. Livezey, E. F. Abbott, J. W. Walker, W. L. Grant, Charles Donnelly, E. S. Reed, H. C. M. Dodsworth, J. W. Fen-
85 ton, Francis Ford, and J. W. Baker, who were elected, tried, and sworn well and truly to try the issue joined and a true verdict render according to the law and evidence.

There not being time to hear all the evidence, the jury are adjourned until to-morrow morning at 10 o'clock.

And on the following day, to wit, on Wednesday, August 11th, A. D. 1880, the following order was made, viz:

KATE APPPEGATE *et al. vs.* LEX. & CARTER COUNTY MINING CO. *et al.*

This day came the parties, by their attorneys; came also the jury as of yesterday. The jury heard the evidence in part, but there not being time to finish the evidence, the jury are adjourned until to-morrow morning at 10 o'clock.

And on another day continued and held, to wit, on Thursday, August 12th, A. D. 1880, the following order was made, viz:

KATE APPLEGATE *et al.*

vs.

LEX. & CARTER COUNTY R. R. & MINING CO. *et al.*

86 This day came again the jury as of yesterday. The jury heard the evidence in part, but there not being time to conclude the same, the jury are adjourned until to-morrow morning at 10 o'clock.

And on the following day, to wit, on Friday, August 13th, A. D. 1880, the following order was made, viz:

KATE APPLEGATE *et al.*
vs.
LEX. & CARTER COUNTY MINING AND R. R. CO. *et al.*

This day came the plaintiffs, by their attorneys; came also the defendants, by their attorneys.

The plaintiffs, by their attorneys, filed exceptions to the depositions of plaintiffs' witnesses, to wit: Jefferson Heaton, Thomas McKinster, A. C. Faid, Robert Gailbraith, Meredith Chaffin, Moses Shavers, Champness Gee; also to the depositions for defendants, as follows: Henry Stark, Daniel Clifton, Moses Gullett, Ezekiel McCoy, James Tackett, John Bays, John Pridemore, Edward Whitaker, Edward H. Walcott, Sebastian Eifert, Pleasant Norton, Lindsey Bellow, W. A. Keepen, John Reaves, John H. Long, Lewis Hood, George W. Long, Frank Fairbairn, Harvey McWhorter, James Hall, Henry Gee, Alfred Devore, R. W. Lampton.

87 The jury heard the evidence, and, on motion of defendant and under instruction of the court, returned the following verdict, to wit:

"We, the jury, find for the defendants.

"FRANCIS FORD, *Foreman.*"

It is therefore ordered by the court that defendants recover of the plaintiffs their costs herein expended, for which they may have execution, and that the defendants go hence without day.

And on another day continued and held, to wit, on Saturday, August 14th, A. D. 1880, the following order was made, viz:

KATE APPLEGATE *et al. vs.* LEX & CARTER COUNTY MINING CO., &c.

This day came the plaintiffs and filed their motion and grounds for new trial herein, in writing, to which the defendants objected; and thereupon the court, being sufficiently advised, overrule said motion for new trial, to which ruling of the court plaintiffs except.

Thereupon came the plaintiffs and presented their bill of exceptions, which is filed, signed and approved by the court, and

88 ordered to be enrolled and made part of the record.

And it appearing to the presiding judge that it is necessary and proper that the original papers produced under subpœna *duces tecum* herein unto the clerk of the Greenup circuit court should be inspected by the Supreme Court upon the writ of error herein, it is ordered that the said papers remain in the custody of the clerk of this court until such reasonable time as they may be required by the Supreme Court of the United States upon the trial of said writ of error, and that they be at that time forwarded by the said clerk to the clerk of the Supreme Court, the said papers herein referred to being the deed from Wm. Fleming and others, trustees, to John and William Bryan and wife, to Samuel Sackett, dated Jan'y 28th, 1797, and deed from Chas. Fleming to John and William Bryan, dated August 8th, 1794, and the papers of said case of Hughes *vs.* Shores' Heirs remain in the custody of the clerk of that court for the period

of ninety days, for the purpose of being copied, after which, at the cost of plaintiffs, they shall be returned by him to the clerk of the Greenup circuit court, but that said three deeds be retained, as hereinbefore directed.

89 *Bill of Exceptions.*

United States Circuit Court for the District of Kentucky.

KATE APPLEGATE & *als.*, Plaintiffs,

vs.

THE LEXINGTON AND CARTER COUNTY MINING CO. & *als.*, Defendants.

Be it remembered that on the trial of this cause, at the special term of the court aforesaid, held at Covington, commencing on the 10th day of August, 1880, the plaintiffs offered and read in evidence a copy from the land office of Kentucky of a patent issued by the State of Virginia to Charles Fleming on the 21st day of April, 1792, for eighteen thousand acres, of which the plaintiffs claim the land in controversy herein is a part.

Said patent is in words and figures as follows:

Henry Lee, Esq., Governor of the Commonwealth of Virginia, to all whom these presents shall come, Greeting:

Know ye that by virtue and in consideration of part of a land office treasury warrant, No. 20345, issued the 8th day of
90 November, 1783, there is granted by said Commonwealth unto Charles Fleming a certain tract or parcel of land, containing eighteen thousand acres by survey, bearing date the 8th day of January, one thousand seven hundred and ninety, lying and being in the county of Mason, on the waters of the Ohio, and bounded as followeth, to wit: Beginning at the east corner of William Fitzhright's twelve-thousand acre entry, at five hickories and six white oaks, standing in a bottom, thence south forty-five degrees west one thousand two hundred eighty poles, crossing branches, to two red oaks, two dogwoods, and a maple; thence south forty-five degrees east two thousand two hundred and fifty poles, crossing branches, to five white oaks; thence north forty-five degrees east one thousand two hundred eighty poles, crossing branches, to a stake; thence north forty-five degrees west two thousand two hundred and fifty poles, crossing branches, to the beginning, with its appurtenances; to have and to hold the said tract or parcel of land, with its appurtenances, to the said Charles Fleming and his heirs forever.

In witness whereof, the said Henry Lee, Esq., Governor of the Commonwealth of Virginia, hath hereunto set his hand and
91 and caused the lesser seal of the said Commonwealth to be affixed, at Richmond, on the 21st day of April, in the year of our Lord one thousand seven hundred and ninety-two, and of the Commonwealth the sixteenth.

HENRY LEE.

LAND OFFICE OF KENTUCKY,
FRANKFORT, *May* 12, 1879.

I, T. D. Marcum, register of the land office for the State of Kentucky, do certify that the within is a true and correct copy of a patent issued to Chas. Fleming by the Commonwealth of Virginia, as appears of record in this office.

Given under my hand and seal of office, the day and date above written.

[L. S.] T. D. MARCUM, *R. L. O.*

COMMONWEALTH OF KENTUCKY,
OFFICE OF THE SECRETARY OF STATE.

I, J. Stoddard Johnston, secretary of State of the Commonwealth aforesaid, do hereby certify that T. D. Marcum, whose genuine signature appears to the foregoing instrument of writing, is, and was at the date thereof, the duly commissioned, qualified, and acting register of the land office of Kentucky; that all his official
92 acts as such are entitled to full faith and credit, and that the attestation is in due form and by the proper officer.

In testimony whereof, I have hereunto set my hand and affixed my official seal. Done at Frankfort, this 12th day of May, one thousand eight hundred and seventy-nine, and in the eighty-seventh year of the Commonwealth.

[L. S.] STODDARD JOHNSTON,
Secretary of State,
By THOS. S. BRONSTON,
Assistant Secretary.

And plaintiffs also offered and read in evidence a copy from the Greenup county court of the last will of Charles Fleming, and of the certificates of probate thereof. The defendants objected to the reading thereof; court overruling objections, and defendants excepted.

Said will and certificates are in words and figures as follows:

In the name of God, Amen. I, Charles Fleming, of Chesterfield county, being of sound mind and memory, do make, publish, and ordain this my last will and testament, after my just and legal debts are fully paid, I will and direct the following distribution of
93 all my real and personal estate, both in the State of Virginia and of Kentucky: First, I give all my real estate which lies and is situated in the State of Kentucky to my brother William Fleming, and my two nephews, John Bernard, Jun'r, and Richard Bernard, in trust, to be sold for the benefit of my creditors, and to pay such legacies as shall be hereafter directed, which real estate consists of the following tracts and parcels of land, viz: One tract of land lying in the county of Mason, and situated on the waters of the Ohio river, containing eighteen thousand acres. Also one other tract lying in the same county, and situated on the same waters, containing twenty thousand acres. Also one other tract in the same county, and containing sixteen thousand one hundred and ninety-one acres. Also one tract lying on the mouth of Glen's creek, about

four miles from Frankfort, only one moiety of the above tracts and parcels of land being mine. Mine is all that give the aforesaid trustees for the above-mentioned purposes, after my debts are discharged by the money arising from the sale of my land, by the above-mentioned trustees, of the remainder or residue of the money arising from the sale of my land, I give and bequeath one-fifth part to my two *neices*, Mary Lewis and Susanna Lewis, their
94 heirs or assigns, forever. Item: I give and bequeath to my brother, William Fleming, John Bernard, Jr., and Richard Bernard, in trust for my sister, Mary Bernard, or for her surviving children, two-fifths of the aforesaid residue or remainder to them, their heirs or assigns, forever. By which I mean, that the aforesaid two-fifths shall be appropriated by the said trustees to the support and maintenance of my sister, Mary Bernard, for her life, and after her death, to be equally divided among such of her children as shall survive her, or their representatives. Item: I give and bequeath the remaining two-fifths of the first mentioned residue to my brother, William Fleming, his heirs and assigns, forever. I appoint my brother, William Fleming, sole executor of this my last will and testament, hereby revoking all former wills.

In witness whereof, I have hereunto set my hand and seal, this eighth day of October, one thousand eight hundred and ninety-three.

CHARLES FLEMING. [SEAL.]

Teste:
ROBERT HASKINS, JR.
JOHN BERISFORD.
JOSIAH LEAK, JUN'R.

In Chesterfield County Court, December 8th, 1794.

95 The last will and testament of Charles Fleming, deceased, was presented in court by Wiltiam Fleming, ex'or therein named, proved by the oaths of Robert Haskins and John Berisford, witnesses thereto, and ordered to be recorded; and on motion of the said executor, who gave bond and took the oath required by law, a certificate of having obtained a probate in due form is granted him.

STATE OF VIRGINIA, *Chesterfield County*, } *To wit:*

I, Thomas Watkins, clerk of Chesterfield county court, do certify that the foregoing is truly copied from the records of my office.

In testimony whereof, I have hereunto subscribed my hand and have caused the official seal of the said county to be affixed, this 20th day of January, anno Dom. one thousand eight hundred and eleven, and in the 35th year of our foundation.

[SEAL.] TH. WATKINS, *Cl'k.*

STATE OF VIRGINIA, *Chesterfield County*, } *sct:*

I, Daniel Boisseau, presiding justice of the peace for the county aforesaid, do certify that the foregoing certificate of attesta-
96 tion which is signed by Thomas Watkins, clerk of Chesterfield county court is made in due form of law.

Given under my hand and seal, this 26th day of January, anno Domini 1811, and in the 35th year of our Independence.

DANIEL BOISSEAU. [SEAL.]

At a county court held for Greenup county, at the court-house, on Monday, the 22d day of February, 1819, this copy of the last will and testimonial of Charles Fleming, dec'd, was proved to be a correct copy of the original will of the said testator by the oaths of Josiah Leak, Jr., and Robert Haskins, Jr., two of the subscribing witnesses to said original will, and that the said will was signed and published by the said Charles Fleming as his last will and testament, and that he was of sound and disposing mind and memory. That they signed their names as subscribing witnesses to said will in the presence and with the consent of the testator, and thereupon the said copy is ordered to be recorded, which is accordingly done.

Attest: JOHN HOCKADAY,
Clerk G. C. Court.

97 *Josiah Leak, R. Haskins.*

The deposition of Josiah Leak, taken before me, Eleazer Clay, presiding justice of the peace for Chesterfield county, pursuant to a dedimus to me directed from the county court of Greenup, in the Commonwealth of Kentucky, to be read in said county court as evidence of the execution of the will of Charles Fleming, deceased.

This deponent, being of lawful age and first duly sworn, deposeth and saith: That he has this day examined the will of Charles Fleming, deceased, which is recorded in the office of Chesterfield county court, to which he is a subscribing witness. He says said will was signed and published by said Charles Fleming as his last will and testament. That at the time of the execution of the same the testator was of sound and disposing mind and memory, and further this deponent signed his name as a subscribing witness to said will, in the presence and with the consent of the testator. This deponent further says that he has compared the copy annexed, on the back of which he has written his name, with the original, and finds it to be a true copy; and further this deponent saith not.

JOSIAH LEAK.

VIRGINIA, *Chesterfield*, } *To wit:*

98 This deposition of Josiah Leak was this day taken, subscribed, and sworn to before me, Eleazer Clay, the presiding justice of the peace for Chesterfield county.

Given under my hand and seal, this 28th November, 1818.

ELEAZER CLAY. [SEAL.]

The deposition of Robert Hawkins, taken before me, Eleazer Clay, presiding justice of the peace for Chesterffeld county, pursuant to a dedimus to me directed from the county court of Greenup, in the Commonwealth of Kentucky, to be read in said county court as evidence of the execution of the will of Charles Fleming, deceased. This deponent being of lawful age and first duly sworn, deposeth and saith: That he has this day examined the will of Charles Fleming, which is recorded in the office of Chesterfield county court, to which he is a subscribing witness. He says said will was signed and published by said Charles Fleming as his last will and testament. That at the time of the execution of the same the testator was of sound and disposing mind and memory, and further this deponent signed his name to said will as a subscribing witness in the presence and with the consent of the testator. This deponent further says he has compared the copy annexed, on the back
99 of which he has written his name, with the original, and finds it to be a true copy; and further this deponent saith not.

R. HASKINS.

VIRGINIA, *Chesterfield,* } *To wit:*

This deposition of Robert Haskins was this day taken, subscribed, and sworn to before me, Eleazer Clay, presiding justice of the peace for Chesterfield county.

Given under my hand and seal, this 30th November, 1818.

ELEAZER CLAY. [SEAL.]

VIRGINIA, *Chesterfield County:*

I, Parke Poindexter, clerk of Chesterfield county court, do hereby certify that Eleazer Clay, whose signature is affixed to the annexed affidavit, is the presiding justice of the peace in and for the county aforesaid, and that full faith and credit ought to be given to all his legal official acts as such.

In testimony whereof, I have hereunto set my hand and have caused the official seal of my said county to be affixed, this 3d day of December, 1818, and in the 43d year of our Independence.

[SEAL.] PARKE POINDEXTER, *C.*

100 STATE OF KENTUCKY, *Greenup County, Town of Greenup,* } *ss:*

I, George A. Corum, clerk of the Greenup county court, in the State of Kentucky, do certify that the foregoing is a true, perfect, and complete copy of the record of the will of Charles Fleming, deceased, as the same has been taken and copied from the records in my office.

In testimony whereof, I have hereunto set my hand and affixed my official seal, on this 12th day of May, anno Domini 1880.

[L. S.] GEO. A. CORUM, *Clk.*

STATE OF KENTUCKY, } *set:*
Greenup County, }

I, W. J. Worthington, presiding judge of the Greenup county court, in the State of Kentucky, do certify that the office of the clerk of said court for said county is kept in the town of Greenup, and that the foregoing attestation is in due form, and by the proper officer, and the signature is genuine.

In witness whereof, I have hereunto set my hand, at Greenup aforesaid, this 12th day of May, anno Domini eighteen hundred and eighty.

W. J. WORTHINGTON,
J. G. C. C.

101 STATE OF KENTUCKY, } *set:*
Greenup County. }

I, George A. Corum, clerk of the Greenup county court, in the State of Kentucky, do hereby certify that W. J. Worthington is presiding judge of said court, duly commissioned and qualified, and that the signature to the foregoing certificate is the genuine signature of the said W. J. Worthington.

In witness whereof, I have hereunto set my hand and seal of office, at Greenup, this 12th day of May, anno Domini, eighteen hundred and eighty.

GEO. A. CORUM, *Clk.*

The plaintiffs then offered and read in evidence a copy from the clerk's office of the Mason county court of a deed from Samuel Sackett and wife to Joseph Conkling and others, dated Aug. 29th, 1795—

Which deed is in words and figures as follows:

This indenture, made this twenty-ninth day of August, in the year of our Lord one thousand seven hundred and ninety-five, between Samuel Sackett, of the city of New York, and Elizabeth, his wife, of the first part, and Joseph Conkling, Jr., and Samuel
102 P. Loyd, of the same city, of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of three thousand seven hundred and seventy-seven pounds seventeen shillings and four pence, current money of the State of New York, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, enfeoffed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, enfeoff, and confirm unto the said parties of the second part, in the actual possession, now being by virtue of a bargain and sale to them thereof made by indenture, bearing date the day before the day of the date of these presents, and also by virtue of the statute for transferring of uses into possession, and to their heirs and assigns forever, all those two certain tracts, pieces, or parcels of land situate, lying, and being in the late Commonwealth of Virginia, now State of Kentucky, in the late county of Mason, and on the waters of the Ohio,

the one tract containing twenty thousand acres, being patented to Charles Fleming by the said Commonwealth of Virginia, and bounded as follows, to wit: Beginning at the south corner of an entry, in the name of General James Wilkinson and Company,
103 of thirty-seven thousand two hundred and fifty-six acres, at five white oaks and three black oaks; thence south forty-five degrees west two thousand five hundred and sixty poles, crossing several waters, to three black oaks and sour-wood; thence north forty-five degrees west one thousand two hundred and fifty poles, crossing several waters to six white oaks; thence north forty-five degrees east two thousand five hundred and sixty poles, crossing several waters to two white oaks, two black oaks, and two sour-woods; thence south forty-five degrees east one thousand two hundred and fifty poles, crossing several waters, to the beginning. The second of the said tracts containing eight thousand three hundred and thirty-four acres, and being part of a tract of eighteen thousand acres, which is patented to the said Charles Fleming, and bounded as follows, to wit: Beginning at the east corner of William Fitzhughes twelve thosand acre entry, at four hickories and six white oaks, standing in a bottom, thence south forty-five degrees west one thousand two hundred and eighty poles, crossing branches to two red oaks, two dogwoods, and a maple; thence south forty-five degrees east two thousand two hundred and fifty poles, crossing branches to
104 five white oaks; thence north forty-five degrees east one thousand two hundred and eighty poles, crossing branches to a stake; thence north forty-five degrees west two thousand two hundred and fifty poles, crossing branches to the beginning, which said eight thousand three hundred and thirty-four acres are bounded as follows, to wit: Beginning at the most southerly corner of the said last-mentioned tract of land, at the said five white oaks, thence north forty-five degrees east one thousand two hundred and eighty poles, to a stake; thence north forty-five degrees west from the said two last-mentioned bounds, so far as to include the said eight thousand three hundred and thirty-four acres, and containing, with the said first-mentioned tract, twenty-eight thousand three hundred and thirty-four acres, together with all and singular the profits, privileges, advantages, emoluments, rights, members, hereditaments, and appurtenances whatsoever, to the said twenty-eight thousand three hundred and thirty-four acres belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders thereof, and also all the estate, right, title, interest, property, possession, claim, and demand of the said parties of the first part of, in, and to the same, and of, in, and to
105 every part and parcel thereof. To have and to hold the said tracts of land to the said parties of the second part, their heirs and assigns, to the only proper use, benefit, and behoof of the said parties of the second part, their heirs and assigns forever, as tenant in common; and the said parties of the first part, for themselves, their heirs, executors, and administrators do covenant and grant to and with the said parties of the second part, their heirs and assigns, that at and immediately before the ensealing and delivery of these

presents they are seized in their own right, in fee simple, of a good estate of inheritance, and have in themselves good right, full power, and lawful authority to sell and convey the same in manner above mentioned; and that it shall and may be lawful to and for the said parties of the second part, their heirs and assigns forever hereafter, to hold and enjoy the said hereby granted premises free and clear of and from all and all manner of impediment or eviction of any person or persons whatsoever; and that the same now is, and shall forever hereafter remain, free and clear from all incumbrances by them made thereof in any manner whatsoever; and that the said parties of the first part and their heirs, the said hereby granted prem-
106 ises, with the appurtenances, unto the said parties of the second part, their heirs and assigns, shall and will warrant, and by these presents forever defend, against all and every person or persons whatsoever; and lastly, that the said parties of the first part and their heirs and all lawful claiming, or to claim by, from, or under them, shall and will at all times hereafter, at the expense of the said parties of the second part, their heirs and assigns, further do acknowledge and execute all such further and other deed or deeds, conveyance or conveyances in the law as their counsel learned in the law shall reasonably advise and require.

In witness whereof, the parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

SAMUEL SACKETT. [SEAL.]
ELIZABETH SACKETT. [SEAL.]

Sealed and delivered in the presence of us—
JAMES B. CLARKE.
WHO. KYSAM.
JOHN CAMPBELL.

We, Wynant Vanżandt and John Campbell, Esq'rs, two of the aldermen, and justices of the peace of the city and county of
107 New York, in the State of New York, do hereby certify that on the thirty-first day of August, in the year of our Lord one thousand seven hundred and ninety-five, personally appeared before us, the within-named Samuel Sackett and Elizabeth, his wife, who reside in the said city, county, and State, and having signed, sealed, and acknowledged the within mortgage deed in our presence acknowledged that they executed the same for the uses and purposes therein mentioned; and the said Elizabeth being examined by us apart from her husband, acknowledged that she executed the same freely and voluntarily, and that she freely relinquished her right of dower in the lands in the said deed mentioned, and we finding no material erasures or interlineaments, except such as are noted, do allow the same to be recorded.

As witness our hands—

WYNANT VANZANDT,
Ald'm & Jus. of the Peace.
JOHN CAMPBELL,
Ald'm & Jus. of the Peace.

CITY AND COUNTY OF NEW YORK, *ss:*

I, Robert Benson, clerk of the city and county of New York, in the State of New York, do hereby certify that the above-named Wynant Vanzandt and John Campbell are aldermen and justices of the peace in the said city, county, and State, and that due
108 faith and credit is to be given to any act done by them when acting in their official characters.

In witness whereof I have hereunto affixed the seal of the said county, and subscribed my name, this 31st day of August, in the year of our Lord one thousand seven hundred and ninety-five.

ROBERT BENSON, *Cl'k.*

At a court held for Mason county, this 22d day of December, 1795, this indenture of bargain and sale from Sackett and wife to Conkling and Company was presented in court, and ordered to be recorded

Teste: T. MARSHALL, JR., *C. M. C.*

STATE OF KENTUCKY, *Mason County,* } *sct:*

I, W. W. Ball, clerk of the county court for the county and State aforesaid, do certify that the foregoing is a true copy of a deed from Samuel Sackett and wife to Joseph Conkling and Sam'l P. Loyd, together with the certificate of acknowledgment and orders, admitted same to record, as the same appears recorded in deed book "B," pages 520, 521, 522, 523, 524, and 525, Mason county court clerk's office.

Witness my hand and official seal as clerk of said court, this 23d day of November, 1878.

109 W. W. BALL,
Clerk Mason County Court.

STATE OF KENTUCKY, *Mason County,* } *sct:*

I, Garrett S. Wall, presiding judge of the Mason county court, certify that W. W. Ball, whose signature appears above, is, and was at the date of his certificate above, clerk of the Mason county court, and that his aforesaid attestation is in due form and by the proper officer.

Given under my hand, this November 26th, 1878.

GARRETT S. WALL,
Presiding Judge of Mason County Court.

STATE OF KENTUCKY, *Mason County,* } *sct:*

I, W. W. Ball, clerk of the county court for the county and State aforesaid, do certify that Garrett S. Wall, whose signature appears to the foregoing certificate, is, and was at the date thereof, presiding judge of the Mason county court, duly commissioned and qualified as such, and that due faith and credit is to be given to any act done by him when acting officially.

110 Witness my hand and official seal, this 27th day of Nov., 1878.

[SEAL.] W. W. BALL,
Clerk Mason Co. Court.

To this offer to read, and to the reading thereof, defendants objected, but the court overruled the objections, and defendants excepted, and still do except.

And also offered and read in evidence a copy from the clerk's office of the Mason county court of a mortgage from Joseph Conkling and others to Sam'l Sackett, dated August 29th, 1795.

Which deed is in words and figures as follows, to wit:

This indenture, made the twenty-ninth day of August, in the year of our Lord one thousand seven hundred and ninety-five, between Joseph Conkling, Jun'r, and Samuel P. Loyd, of the city of New York, of the first part, and Samuel Sackett, of the same city, of the second part, witnesseth:

That whereas the said parties of the first part, in and by their two several bonds or obligations, duly executed and bearing even date with these presents, stands held and firmly bound unto the said party of the second part in the one bond in the penal sum of
111 two thousand eight hundred and thirty-three pounds twelve shillings, with a condition thereunder written for the payment of the sum of one thousand four hundred and sixteen pounds sixteen shillings, current money of the State of New York, on or before the twenty-eighth day of May, in the year of our Lord one thousand seven hundred and ninety-six; and in the other bond, in the like penal sum of two thousand eight hundred and thirty-three pounds twelve shillings, with a condition thereunder written for the payment of the sum of one thousand four hundred and sixteen punds sixteen shillings, like current money of the State of New York, on or before the twenty-eighth day of May, in the year of our Lord one thousand seven hundred and ninety-seven, as in and by the said several bonds or obligations and the conditions thereunder written, reference being thereunto had, may more fully and at large appear: Now, therefore, this indenture witnesseth, that the said parties of the first part, for the better securing of the sums mentioned in the conditions of the said bonds, and also in consideration of the sum of ten shillings to said parties of the first part in hand paid by the said party of the second part, have granted, bargained, aliened, sold, remised, released, enfeoffed, and confirmed,
112 and by these presents do grant, bargain, sell, alien, remise, release, enfeoff, and confirm unto the said party of the second part, in his actual possession, now being by virtue of a lease for one year, bearing date the day before the day of the date of these presents, and to his heirs and assigns forever, all those two certain tracts, pieces, and parcels of land situate, lying, and being in the late Commonwealth of Virginia, now State of Kentucky, in the late county of Mason, and on the waters of the Ohio, the one tract containing twenty thousand acres, being patented to Charles Fleming by the said Commonwealth of Virginia, and bounded as followeth,

to wit: Beginning at the south corner of an entry in the name of General James Wilkinson and Company of thirty-seven thousand two hundred and fifty-six acres at five white oaks and three black oaks, thence south forty-five degrees, west two thousand five hundred and sixty poles, crossing several waters, to three black oaks and sour-wood, thence north forty-five degrees, west one thousand two hundred and fifty poles, crossing several waters, to six white oaks; thence north forty-five degrees, east two thousand five hundred and sixty poles, crossing several waters, to two white oaks, two black
113 oaks, and two sour-woods; thence south forty-five degrees, east one thousand two hundred and fifty poles, crossing several waters, to the beginning.

The second of the said tracts, containing eight thousand three hundred and thirty-four acres, and being part of a tract of eighteen thousand acres, which is patented to the said Charles Fleming, and bounded as follows, to wit: Beginning at the east corner of William Fitzhues' twelve-thousand-acre entry, at four hickories and white oaks, standing in a bottom, thence south forty-five degrees west, one thousand two hundred and eighty poles, crossing branches, to two red oaks, two dogwoods and a maple; thence south forty-five degrees, east two thousand two hundred and fifty poles, crossing branches, to five white oaks; thence north forty-five degrees, east one thousand two hundred and eighty poles, crossing branches, to a stake; thence forty-five degrees west, two thousand two hundred and fifty poles, crossing branches, to the beginning, which said eight thousand three hundred and thirty-four acres are bounded as follows, to wit: Beginning at the most southerly corner of the said last-mentioned tract of land at the said five white oaks, thence north forty-five degrees, east one thousand two hundred and eighty poles, to a stake;
114 thence north forty-five degrees west from the said two last-mentioned bounds so far as to conclude the said eight thousand three hundred and thirty-four acres, together with all and singular the rights, members, hereditaments and appurtenances to the same belonging or in anywise appertaining, and all the estate, right, title, and interest of the said parties of the first part of, in, and to the same, and of, in, and to every part and parcel thereof; to have and to hold to the said party of the second part, his heirs and assigns forever, provided always, nevertheless, and it is the true intent and meaning of the parties to these presents, that the said parties of the first part, their executors or administrators, shall well and truly pay unto the said party of the second part, his executors, administrators, and assigns, the said several sums of money mentioned in the conditions of the before-recited bonds, according to the true intent and meaning thereof at the time specified for the payment thereof; that then and from thenceforth these presents and everything herein contained shall cease, determine and be absolutely void; otherwise shall stand, be, and remain in full force and virtue. And the said parties of the first part, for themselves and their heirs, jointly and severally, hereby authorize and
115 fully empower the said party of the second part, his executors, administrators, and assigns, if the said parties of the

first part shall neglect, delay, or refuse to pay the said sums mentioned in the conditions of the said bonds, to sell and convey the same at public vendue or auction, at the city of New York, or in the State of Kentucky, at the town of Lexington, to the highest bidder, after advertising the same for thirty days in a public newspaper, and giving thirty days' notice of the time and place of sale to the said parties of the first part, or one of them, their or one of their heirs, executors, administrators, or assigns, in case they reside in the said city of New York, and to make a warrantee deed to such highest bidder in our or one of our names, or his name, as attorney, as aforesaid, and attorneys under him, for the purpose aforesaid, to make and constitute and again at pleasure to revoke; and out of the moneys for which the said land is sold at such vendue or auction to deduct the moneys and interest thereof due on the before-mentioned bonds, with the expenses of such sale, and return the overplus to the said parties of the first part on their demanding the same.

116 In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year above written.

JOSEPH CONKLING, JR. [SEAL.]
SAMUEL P. LOYD. [SEAL.]

Sealed and delivered in presence of—
JAMES B. CLARKE.
JOHN CAMPBELL.
WHITEHEAD KYSANE.

We, John Campbell and Wynant Vanzandt, Esq'rs, two of the aldermen and justices of the peace of the city and county of New York, in the State of New York, do hereby certify that on the thirty-first day of August in the year of our Lord one thousand seven hundred and ninety-five, personally appeared before us the within-named Joseph Conkling, Jun'r, and Sam'l P. Loyd, who reside in the said city of New York, and having signed, sealed, and acknowledged the within mortgage in our presence, acknowledged that they executed the same for the uses and purposes therein mentioned, and we finding no material erasures or interlineations, do allow the same to be recorded.

As witness our hands.

WYNANT VANZANDT,
Ald'n & Justice of the Peace.
JOHN CAMPBELL,
Ald. & Justice of the Peace.

CITY AND COUNTY OF NEW YORK, *set:*

117 I, Robert Benson, clerk of the city and county of New York, in the State of New York, do hereby certify that the above-named Wynant Vanzandt and John Campbell are aldermen and justices of the peace in the said city, county, and State, and that due faith and credit is to be given to any act done by them when acting in their official capacities.

In witness whereof, I have hereunto affixed the seal of the said county and subscribed my name, this thirty-first day of August, in the year of our Lord one thousand seven hundred and ninety-five.

ROBT BENSON, *Clk.*

At a court held for Mason county the 22d day of December, 1795, this mortgage from Conkling and Loyd to Sackett was presented in court and ordered to be recorded.

Teste: T. MARSHALL, JR., *C. M. C.*

STATE OF KENTUCKY, } *sct:*
Mason County, }

I, W. W. Ball, clerk of the county court for the county and State aforesaid, do certify that the foregoing is a true copy of a mortgage from Joseph Conkling & Samuel P. Loyd to Sam'l Sackett, together with the certificates of acknowledgement
118 and order admitting same to record, as the same appears recorded in deed book "B," pages 515, 516, 517, 518, 519, & 520, Mason county clerk's office.

Witness my hand and official seal as clerk of said court, this 23d day of November, 1878.

[SEAL.]

W. W. BALL,
Clerk Mason Co. Court.

STATE OF KENTUCKY, } *sct:*
Mason County, }

I, Garrett S. Wall, presiding judge of the Mason county court, certify that W. W. Ball, whose signature appears above, is and was at the date of his certificate above, clerk of the Mason county court, and that his aforesaid attestation is in due form and by the proper officer.

Given under my hand, this November 26th, 1878.

GARRETT S. WALL,
Presiding Judge of Mason County Court.

STATE OF KENTUCKY, } *sct:*
Mason County, }

I, W. W. Ball, clerk of the county court for the county and State aforesaid, do certify that Garrett S. Wall, whose signature ap-
119 pears to the foregoing certificate, is and was at the date thereof presiding judge of the Mason county court, duly commissioned and qualified as such, and that due faith and credit is to be given to any act done by him when acting officially.

Witness my hand and official seal, this 27th day of Nov., 1878.

[SEAL.]

W. W. BALL,
Clerk Mason Co. C't.

To this offer and to the reading of said paper defendants objected, but the court overruled the objections, and defendants excepted and still except.

Plaintiffs then offered in evidence a copy from the clerk's office of the Kentucky court of appeals of a deed from Wm. Fleming and others, trustees, under the will of Charles Fleming, to John and Wm. Bryan, dated December 31st, 1796; to the reading of which deed the defendants objected, and the court sustained said objection and refused to permit the same to be read to the jury, to which ruling of the — plaintiffs at the time excepted and still except.

The said copy of said deed from Wm. Fleming and others, trustees, to John and William Bryan, is in words and figures as follows:

120 *D. D. to Hughes.*

DECEMBER 2*d*, 1878.

STATE OF KENTUCKY:

Court of Appeals.

FLEMING *et al.* to BRYAN.

This indenture, made this thirty-first day of December, in the year one thousand seven hundred and ninety-six, between Wm. Fleming, John Bernard, Richard Bernard, and Charles Marshall, by William Marshall, his attorney-in-fact, of the State of Virginia, of the one part, and John Bryan, of the State of New Jersey, of the other part, witnesseth: That whereas a certain Charles Fleming, late of the county of Chesterfield and Commonwealth of Virginia, now deceased, was seized and possessed of three tracts or parcels of land situate, lying, and being in the county of Mason and Commonwealth of Kentucky, the one of sixteen thousand one hundred and ninety-one acres, one other for eighteen thousand acres, and the third for twenty thousand acres, amounting in the whole to fifty-four thousand one hundred and ninety-one acres; and whereas the before-named Charles Marshall was entitled to one moiety of the said tracts or parcels of land as having located the same for the said Chas. Fleming

121 and the said Charles Marshall having sold to John and William Bryan thirteen thousand three hundred and thirty-four acres of the said land, did, in the lifetime of the said Charles Fleming, request a conveyance for that amount to be made to the said John and William Bryan, which was accordingly done by deed, which did not ascertain the bounds of the same in the tract out of which it was to be taken, but only conveying that quantity out of the aforesaid three tracts; and whereas the said Charles Fleming, deceased, after having made the said conveyance to the said John and William Bryan, duly made and published his last will and testament in writing, bearing the date the eighth day of October, in the year one thousand seven hundred and ninety-three, in which will he gave, among other land, the said three tracts or parcels of land above mentioned to the said William Fleming, John Bernard, and Richard Bernard, in trust, to be sold for the benefit of his creditors and to pay such legacies as are in the said will thereafter mentioned and directed, as by said last will and testament of record in the court of Chesterfield county will more fully and at large appear; and whereas the said Charles Marshall is still entitled in equity to

thirteen thousand seven hundred and sixty-one and one-half
122 acres of the said land, and the said William Fleming, John Bernard, and Richard Bernard, and Charles Marshall, have agreed that the whole of the said three tracts of land not conveyed to the said John and William Bryan by the said Charles Fleming, dec'd, should be sold and the purchase-money arising therefrom to be divided as the different parties may be entitled to receive:

Now, this indenture witnesseth: That the said William Fleming, John Bernard, and Richard Bernard, by virtue of the power and authority to them given, and in pursuance of the trust in them reposed, in and by the said last will and testament, and for and in consideration of the sum of one thousand three hundred and sixty-six pounds eighteen shillings and six pence, current money of Virginia, to them in hand paid by the said John Bryan, the receipt whereof they do hereby acknowledge, and thereof do release, acquit, and discharge him and his heirs forever. And the said Charles Marshall, by William Marshall, his attorney-in-fact, in consideration of the agreement aforesaid, have granted, bargained, and sold, and by these presents do grant, bargain, and sell to the said John Bryan, and to his heirs forever, all the residue of the said three tracts of land not before conveyed to John and William Bryan, and amounting to
123 forty thousand eight hundred and fifty-seven acres, which said tracts or parcels of land were granted by the Commonwealth of Virginia to the said Charles Fleming by patents bearing date on the 1st day of April, in the year one thousand seven hundred and ninety-two, and duly recorded in the register's office for the aforesaid Commonwealth, reference being thereunto had will more fully appear, and are bounded as follows, to wit: The sixteen thousand one hundred and ninety-one acres tract on the waters of Ohio, and beginning at the south corner of an entry in the name of William Payne for fourteen hundred six and an half acres, at ten white oaks and four black oaks, on the top of a hill; also, a white oak marked W. R. P. S.; another S. S.; thence north forty-five degrees east four hundred poles, with said Payne's line to Charles Craddock's line, to an ash, gum, white oak, hickory, poplar, and sugar tree, and a beech marked J. S. standing in a bottom on the east side of a small run; thence south forty-five degrees E. one hundred and ninety-four poles, with Craddock's line to his corner, two white oaks, two maples, two sour-trees, two sugar trees; also, a beech marked I. S.; thence north forty-five degrees east three hundred and eighty poles, with Craddock's line, to a forked maple, gum,
124 poplar, black oak, and two sour-woods; thence south sixty-five degrees east one thousand and eighty poles, to Enoch O'Brien's south corner, two white oaks and two black oaks; thence north forty-five degrees east six hundred poles, with O'Brien's line, to Minor Winn's line, two white oaks and sour-wood; thence south forty-five degrees east six hundred and thirty-five poles, to four white oaks; thence north forty-five degrees east eight hundred poles, to said Winn's east corner, three white oaks and two sour-woods; thence south forty-five degrees east one hundred and fifty-nine poles, with a line of Charles Fleming's eighteen thousand acre survey, passing his corner and binding on General James Wilkin-

son's & Co., to the north corner of Charles Fleming's twenty thousand acre entry, two white oaks and black oaks, and two sour-woods; thence south forty-five degrees west two thousand five hundred and sixty poles with said Fleming's line, to his west corner, six white oaks; thence north forty-five degrees west two thousand and seven poles, to the beginning. The tract of eight thousand acres is bounded as follows, to wit: Beginning at the east corner of William Fitzhughes', twelve thousand acre entry, four hickories and six white oaks, standing in a bottom; thence south forty-
125 five degrees west twelve hundred and eighty poles, to two red oaks, two dogwoods, and a maple; thence south forty-five degrees east two thousand two hundred and fifty —, to five white oaks; thence north forty-five degrees east twelve hundred and eighty poles, to a stake; thence north forty-five degrees west two thousand two hundred and fifty poles, to the beginning. And the twenty thousand acre entry is bounded as follows, to wit: Beginning at the south corner of an entry in the name of James Wilkinson & Co., of thirty-seven thousand two hundred and fifty-six acres, five white oaks and three black oaks; thence south forty-five degrees, west two thousand five hundred and sixty poles, to three black oaks and a sour-wood; thence north forty-five degrees west twelve hundred and fifty poles, to six white oaks; thence north forty-five degrees east two thousand five hundred and sixty poles, to two white oaks, two black oaks, and two sour-woods; thence south forty-five degrees east twelve hundred and fifty poles, to the beginning.

To have and to hold the said tracts or parcels of land with their and every of their appurtenances (excepting the land formerly conveyed by the said Chas. Fleming to John and William Bryan)
126 to the said John Bryan and his heirs forever, to the only proper use and behoof of him, the said John Bryan, and his heirs forever; and the said William Fleming, John Bernard, and Richard Bernard, for themselves and their respective heirs, covenant and agree to and with the said Bryan and his heirs forever that they and their heirs shall and will warrant and forever defend the said three tracts or parcels of land, after excluding the part formerly conveyed to said John and William Bryan, to the said John Bryan and his heirs forever from the claim and demand of them, the said William Fleming, John and Richard Bernard, and their respective heirs, and all persons claiming from under them, or either of them, and all other person or persons whatsoever claiming right from under the said Charles Fleming, but not from the claim or demand of any other person or persons whatsoever.

In testimony whereof, the said William Fleming, John Bernard, and Richard Bernard and Charles Marshall, by William Marshall, his attorney-in-fact, have hereunto fixed their respective hands and seals, the day, month, and year first written.

WM. FLEMING. [SEAL.]
JOHN BERNARD. [SEAL.]
RICHARD BERNARD. [SEAL.]
127 CHARLES MARSHALL, [SEAL.]
By WILLIAM MARSHALL, [SEAL.]
His Attorney-in-Fact.

Signed, sealed, and delivered in presence of—
RICHARD BOWLINE.
THOMAS WM. LAWSON.
JACOB VALENTINE.

VIRGINIA, }
City of Richmond, } *Set:*

Be it known to all whom it may concern, that on this second day of January, one thousand seven hundred and ninety-seven, came personally before me, Robert Mitchell, mayor of the said city, William Fleming, John Bernard, Richard Bernard, and William Marshall, attorney-in-fact for Charles Marshall, and acknowledged the annexed indenture of bargain and sale made to John Bryan to be their acts and deeds, hands and seals.

In testimony whereof, I have hereunto put my hand and affixed my seal of office, the day and year last aforesaid.

[L. S.] ROBERT MITCHELL, *Mayor.*

Bryan to Sackett.

Know all men by these presents, that whereas John Bryan, the grantor within named, together with Mary Ann, his wife, having this day by a certain deed executed, sold and conveyed unto
128 Samuel Sackett the premises mentioned within, and every part and parcel thereof, with their and every of their appurtenances, to have and to hold unto him, the said Samuel Sackett, his heirs and assigns; now, therefore, know ye that I, the said John Bryan, in order more fully to confirm and establish the said conveyance and to vest in the said Samuel Sackett as well the said premises within contained as the benefit of the grants, covenants, and agreements for confirmation of the title thereof, in the within deed contained, for divers good causes and considerations, me thereto moving for and in consideration of the sum of five shillings to me in hand paid, the receipt whereof is hereby acknowledged, have given, granted, transferred, assigned, and set over, and by these presents do give, grant, transfer, assign, and set over, the premises within contained, and all and singular the covenants, grants, and agreements within expressed, accompanying and being with the said premises, unto the said Samuel Sackett, his heirs and assigns, to and for his and their own proper use and benefit, hereby authorizing and empowering the said Samuel Sackett, his heirs and assigns, in any eviction, expulsion, impeachment, or failure of
129 title on the premises, in my name or otherwise, as he may be advised by his counsel, learned in the law, but for his and their own proper use and benefit, to ask, demand, sue for, and receive of and from the said William Fleming, John Bernard, Richard Bernard, and Charles Marshall, the grantors within named, all such damages, costs, and charges as I myself, or my assigns by virtue of the said grants, covenants, and agreements might or could lawfully ask, demand, sue for and recover.

In testimony whereof, I have hereunto set my hand and seal, this

twenty-eighth day of January, in the year one thousand seven hundred and ninety-seven (1797).

JOHN BRYAN. [SEAL.]

Sealed and delivered in the presence of the names John Bernard, Richard Bernard, and Charles Marshall, first interlined between the fifth and sixth line from the bottom.

AB'M LAURANCE.

STATE OF KENTUCKY, *set:*

I, Achilles Sneed, clerk of the court of appeals for the State aforesaid, being duly authorized by law to receive, admit, and record deeds and other writings in my office, do certify that the fore-
130 going deed and power of attorney, together with the certificate thereto annexed, was presented to me in my office aforesaid, on the eighth day of June, one thousand eight hundred and sixteen, and the same is duly admitted to record.

In testimony whereof, I have hereunto set my name this 28th day of June, 1816.

ACHILLES SNEED, *C. C. A.*

STATE OF KENTUCKY:

Court of Appeals.

I, T. C. Jones, clerk of court of appeals, State aforesaid, certify that the foregoing deed is truly copied from the record on file in my office.

Given under my hand and official seal, at city of Frankfort, State aforesaid, 2d December, 1878.

[SEAL.] T. C. JONES, *C. C. A.*

I, W. S. Pryor, chief justice for the court of appeals for State of Kentucky, do hereby certify that T. C. Jones, whose genuine signature appears to the foregoing certificate, was at time of signing same clerk of court of appeals aforesaid.

Given under my hand, this Dec. 2d, 1878.

WILL. S. PRYOR,
Chief Justice of the Court of Appeals for Kentucky.

131 STATE OF KENTUCKY:

Court of Appeals.

I, T. C. Jones, clerk of the court of appeals, hereby certify that W. S. Pryor, whose genuine signature appears to foregoing certificate, was at time of signing same chief justice of the court of appeals for State of Kentucky.

Given under my hand and official seal, this 23d Jan'y, 1879.

[SEAL.] T. C. JONES, *C. C. A.*,
By JAS. McAULIFFE, *D. C.*

STATE OF KENTUCKY:

Court of Appeals.

I, T. C. Jones, clerk of the court aforesaid, do hereby certify that the foregoing and hereunto annexed deeds, together with the certificate of Achilles Sneed admitting the same to record, are true copies of records on file in the office of the clerk of the court aforesaid.

Given under my hand and official seal, at the city of Frankfort, State aforesaid, this 12th day of May, 1879.

[SEAL.] T. C. JONES, *C. C. A.*

I, W. S. Pryor, chief justice of the court of appeals of the State of Kentucky, hereby certify that T. C. Jones, whose genuine signature appears to the foregoing certificate, is and was at the time of
132 signing the same clerk of the court of appeals aforesaid, and that his said attestation and certification of the foregoing records hereto attached are in due form and by the proper officer.

Given under my hand, this 12th day of May, 1879.

W. S. PRYOR,
Ch. Justice.

I, T. C. Jones, clerk of the court of appeals for the State of Kentucky, hereby certify that W. S. Pryor, whose genuine signature appears to the next foregoing certificate, is and was at the time of signing same the presiding chief justice of the court of appeals aforesaid, duly commissioned and qualified.

Given under my hand and official seal, this May 12th, 1879.

[SEAL.] T. C. JONES, *C. C. A.*,
By JAMES McAULIFFE, *D. C.*

And plaintiffs thereupon offered in evidence a deed purporting to be the original of the deed last above mentioned, to the reading of which to the jury the defendants objected.

And plaintiffs, in support of the competency of said deed, produced the original papers in the suit of James Hughes against Shore's heirs, & *al.*, from the Greenup circuit court, and proved
133 by the depyty clerk of said court that the said papers were placed in his custody on the 12th day of August, 1880, by the clerk of said court, for the purpose of being produced at the trial of this action, in obedience to a subpœna *duces tecum* from this court; and plaintiffs further proved by one of their attorneys in this suit that the said deed was found by him among the papers of the aforesaid suit of Hughes against Shore's heirs, while engaged in searching in the clerk's office of the Greenup circuit court for evidence in support of plaintiffs' title, in the month of May, 1880; and that the said deed was among the papers of the said case of Hughes against Shore's heirs, as produced on this trial by the said deputy clerk as aforesaid.

The said suit of Hughes against Shore's heirs was filed on the 15th of July, 1815.

The papers in said case are in words and figures as follows:

September 11th, 1780, Levin Powell withdraws his entry of a 1,000 acres that joins Hite on —— creek, also his entry of 1,000 acres, two or three miles from the mouth of Mill creek, and locates 2,000 acres on Harrad's Salt Lick creek, running into the
134 Ohio, about 16 miles above the Scioto, and about twenty miles up the said creek from the mouth, to begin at a white oak tree on the west side of the creek, about ½ mile above a salt lick on the same side of the creek, and to run from thence east and west till it strikes the knobs on each side of the creek; thence down the creek, winding with the knobs for quantity so as to include the said lick and two trees, one marked "H," the other "I. S.," and a small improvement of deadened trees.

A copy: H. LEE, *S. M. C.*

January 10th, 1783, George Mason and Simon Kenton enters 5,496 acres of land on a Treasury warrant, No. 12101, adjoining the upper line of Andrew Dullin of 5,119 acres, entry on Tygart's creek; thence to extend up both sides of the creek, binding on the hill, and keeping the creek near the center of the survey.

A copy.
Teste: H. LEE, *S. M. C.*

October 30th, 1783, Alexander Brown, assg., enters 16,000 acres of land on two Treasury warrants, No-. 18898 and 18896, lying on the waters of the Ohio, beginning in the back line of an entry made in the name of Richard Graham, for 80,496½ acres, at the corner of an entry made for William Fitzhugh, containing 12,000
135 acres, and running thence with the line of said Graham's entry to the corner thereof; thence out at right angles for quantity.

Exam'd. A copy.
Test: ARCHILLES SNEED, *Clk.* 44.

Enoch O'Bryan's Entry. Oct. 31st, 1783.

October 31st, 1783, Enoch O'Bryan enters 3,561½ acres. Beginning at the west corner of Minor Winn's entry of 7,926 acres, and running from thence south 45° west 600 poles; thence at right angles south 45° east, to include the quantity in a square tract.

Exam'd. A copy.
Test: ARCHILLES SNEED, *Clk.* 44.

Endorsed on the back as follows:
Hughes *vs.* Shore's Heirs. Enoch O'Bryan's entry.

October 31st, 1783. Minor Winn, 7,926, Treasury warrant No-. 19190 and 19189, lying on the waters of Ohio. Beginning at the east corner of Geo. Graham's entry, of 4,357 acres, and extending from thence south 45 west 800 poles; then out at right angles S. 45 east from each end of this line for quantity.

Copy.
Test: JOHN YOUNG, *S. G. C.*

136 Oct. 31st, 1783. Enoch O'Bryan, 3,561, Treasury warrant, No. ——. Beginning at the west corner of Minor Winn's entry of 7,926 acres, and running from thence S. 45 W. 600 poles; then at right angles S. 45 E., to include the quantity in a square tract.

Copy.

Test: JOHN YOUNG, *S. G. C.*

Oct. 30th, 1783, Wm. Fitzhugh, assg., enters 12,000 acres of land on 6 Treasury warrants, No. ——, &c., lying on the waters of the Ohio, adjoining an entry of 80,406¼ acres, made in the name of Richard Graham, beginning at the east corner of said entry and running thence S. 45 west, with a line of said entry, 4 miles; then at right angles from each end of this line of 4 miles S. 45 east for quantity.

Exam'd. A copy.

Test: ARCHILLES SNEED, *Clk.* 44.

Oct. 31st, 1783, John Moss enters 3,063½ acres of land on a Treasury warrant, No. 14549. Beginning at Chas. Craddox's east corner, and running from thence N. W. to the line of Alex'r Brown's line; thence with Brown's line N. east, and from the beginning the same course for quantity.

Exam'd. A copy.

Test: ARCHILLES SNEED, *Clk.* 44.

137 Oct. 31st, 1783, George Graham enters 4,857½ acres of land on a Treasury warrant, No. 17558. Beginning at the corner of John Moss' entry, in the line of Alex'r Brown, of 16,000 acres, and with the line of said Brown's entry to the corner, then out at right angles and binding on the entry of said Moss for quantity.

Exam'd. A copy.

Test: ARCHILLES SNEED, *Clk.* 44.

Oct. 31st, 1783, Minor Winn enters 7,926 acres of land on 2 Treasury warrants, No. —, &c., lying on the waters of the Ohio. Beginning at the east corner of Geo. Graham's entry of 4,857½ acres, and extending from thence S. 45 west 800 poles; thence out at right angles S. 45 east from each end of this line for quantity.

Exam'd. A copy.

Test: ACHILLES SNEED, *Clk.* 44.

Oct. 31st, 1783, Evan Griffith, assg., enters 2,051¾ acres of land on a Treasury warrant, No. 19180, lying on the waters of the Ohio. Beginning at the east corner of Alex'r Brown's entry of 16,000 acres, and running S. 45 west 400 poles; thence at right angles eastward for quantity.

Exam'd. A copy.

Test: ACHILLES SNEED, *Clk.* 44.

138 Oct. 31st, 1783, Garland Callis enters 4,000 acres of land on two T. w'rts, No. 15282, &c., lying on the waters of Ohio. Beginning in the line of Alex'r Brown's entry of 16,000 acres, at the

corner of Evan Griffith's entry of 2,051¾ acres, and extending with a line of Brown's said entry southwardly 800 poles; thence out at right angles for quantity.

Exam'd. A copy.

Test: ACHILLES SNEED, *Clk.* 44.

Oct. 31st, 1783, Josiah Fishback and Wm. Berry enter 2,205 acres of land on a T. wr., No. 19184. Beginning in the line of Alex'r Brown's entry of 16,000 acres and at the corner of Garland Callis' entry of 4,000 acres, and running with the first-mentioned entry westwardly to the corner; thence out at right angles for quantity.

Exam'd. A copy.

Test: ACHILLES SNEED, *Clk.* 44.

Oct. 31st, 1783, Wm. Payne enters 1,406½ acres of land on a T. w'r't, No. 14544. Beginning at the most south corner of Josiah Fishback's entry of 2,205 acres, and extending with the line N. 45 east 400 poles, then at right angles S. E. for quantity.

Exam'd. A copy.

Test: ACHILLES SNEED, *Clk.* 44.

139 Oct. 31st, 1783, Chas. Craddox enters 4,537½ acres of land on a T. w'r't No. 19579, beginning at the corner of Wm. Payne's entry, in the line of Josiah Fishback's entry of 2,205 acres, and extending with Fishback's entry northeast to the corner, and then out at right angles from each end of this line for quantity.

Exam'd. A copy.

Test: ARCHILLES SNEED, *Clk.* 44.

Endorsed on the back as follows: John Bryan and wife to Samuel Sackett. Received July 6th, 1816. Tax & fee, $4.39.

February 2d, 1785. Chas. Fleming, 22,000. No. 20345. Beginning at the S. corner of Wm. Payne's entry of 1,406 acres, running thence with his line N. 45 W. to the line of an entry of Geo. Craddox of 4,537½ acres; thence S. 45 W., to the corner of said entry; thence N. 45 E., to the corner of Enoch O'Bryan's W. corner of 3561; thence S. 45 E., to his south corner, N. 45 E., to his east corner; thence S. 45 E., and from the beginning S. 45 east, so far that a line No. 45 east shall include the quantity.

Copy. Test: JOHN YOUNG, *S. G. C.*

140 January 10th, 1783, William Byrd enters 4,849 acres of land on two Treasury warrants, Nos. 12408 & 12411, adjoining the upper line of George Mason's entry of 5,496 acres on Tygart's creek; thence to extend up the creek on both sides, binding on the hills, and keeping the creek near the center of the survey.

A copy. Test: H. LEE, *S. M. C.*

March 19th, 1785, James Brumfield, ass'g. of David Maddox, enters 1,387½ acres of land on a T. warrant No. 14341, beginning at Reps Osburn's S. corner in Graham's line of his 80,406½ acre entry,

thence, with Osburn's line, N. E. 600 poles, to his corner, and with Graham's line for quantity to be in parallel lines.

March 19th, 1785, Peter Burksdale enters 750 acres of land on a Treasury warrant No. 8381, to begin in Graham's line, at the south corner of the last entry, and running with the line of the last entry northeast 400 poles; thence, with Graham's line, S. E. for quantity, to be in parallel lines.

A copy. H. LEE, *S. M. C.*

March 19th, 1785, Josephus Perrin enters 346½ acres of land on a T. w'r- No. 14468; beginning at the south corner of Mark
141 Goode's 2,991½ acre entry, and running thence with the line of the first mentioned entry N. E. and from the beginning S. E. far enough to include the quantity in a true square.

A copy. H. LEE, *S. M. C.*

March 19th, 1785, John Cowen, ass'g. of Benj. Logan, enters 1,000 acres of land on two T. w'r'ts, Nos. 4503 & 4504, beginning at the N. corner of the last entry in the line of Mark Goode's entry, thence with Goode's line to his east corner, thence with Ferrin's line S. E. far enough to include the quantity by parallel lines.

A copy. H. LEE, *S. M. C.*

Deed, Aug. 8th, 1794.

C. FLEMING to J. & H. BRYAN.

This indenture, made this 8th day of August, in the year of our Lord one thousand seven hundred and ninety-four, between Charles Fleming of the one part, and John Bryan and Wm. Bryan, of the other part, witnesseth:

That whereas the said John and William are purchasers of, and claim through Charles Marshal, the quantity of thirteen thousand and three hundred acres of land, which the said Charles was
142 entitled to have and receive of and from the said Chas. Fleming for and in consideration of his, the said Chas. Marshall, having located the same and a much larger quantity of land for the said Chas. Fleming; and the said John and William Bryan being entitled to receive a conveyance of the said quantity of thirteen thousand and three hundred acres of land in the place of the said Charles Marshall, and the said Chas. Fleming being willing to make the said conveance of the said quantity of thirteen thousand and three hundred acres of land by deed, with a special warranty to be taken out of a survey for eighteen thousand acres, patented to the said Chas. Fleming, for and in consideration of the premises, and for and in consideration of the sum of ten shillings, current money, to the said Chas. Fleming in hand paid by the said John and William, the receipt whereof the said Chas. Fleming doth hereby acknowledge:

He, the said Chas. Fleming, for himself and his heirs, hath bargained and sold, aliened and confirmed, and by these presents doth bargain and sell, alien and confirm, to the said John Bryan and Wm. Bryan, and their heirs and assigns forever, to hold as tenants

in common, one certain tract or parcel of land containing the quantity of thirteen thousand and three hundred acres (part of
143 a survey of eighteen thousand acres, patented to the said Chas. Fleming by the Governor of Viginia), situate, lying, and being in the county of Mason. on the waters of Ohio, and bounded as follows, viz:

Beginning at the east corner of Wm. Fitzhugh's twelve thousand acre entry at four hickories and six white oaks standing in a bottom; thence south forty-five degrees, west one thousand two hundred and eighty poles, to two red oaks, two dogwoods, and a maple; thence south forty-five degrees, east one thousand two hundred and eighty poles, to a stake; thence north forty-five degrees, east two thousand and forty-five poles, to a stake in the line of the said eighteen thousand acre tract; thence a direct line to the beginning.

To have and to hold the said tract or parcel of land, with its appurtenances, to the said John and Wm. Bryan, and their heirs and assigns, forever, to the only proper use and behoof of them, the said John and Wm. Bryan, and their heirs and assigns, forever.

And to the said Charles Fleming, for himself and his heirs, the said tract or parcel of land, with its appurtenances, to the said John Bryan and Wm. Bryan, their heirs and assigns, will warrant and forever defend against the claim of him, the said Charles
144 Fleming, his heirs and assigns, and all claiming under him or them, will truly and faithfully by these presents.

In testimony whereof, the said Charles Fleming hath hereunto put his hand and seal, the day and year aforesaid.

Test: CHAS. FLEMING. [SEAL.]

We, justices of the peace for the county of Woodford, do certify that Chas. Fleming, whose name is signed to the preceding deed of conveyance, acknowledged the same in our presence to be his act and deed.

Given under our hands, this 8th day of August, 1794.

JOHN CRITTENDEN. [SEAL.]
MANNIS CALMER [SEAL.]

Woodford Court of Quarter Sessions. September Term, 1794.

This indenture of bargain and sale between Chas. Fleming of the one part and John & Wm. Bryan of the other part, together with certificate of the acknowledgment thereof, was produced in court and ordered to be recorded.

Teste: CAVE JOHNSON, *C.*

MASON COUNTY, *set:*

December Court, 1796.

This indenture of bargain and sale from Fleming to John &
145 Wm. Bryan was presented in court and ordered to be recorded.

Teste: T. MARSHALL, JR., *C. M. C.*

Endorsed on the back as follows: Chas. Fleming to John & Wm. Bryan. Deed.

Will of Chas. Fleming. Dec. 8th, 1794.

In the name of God, amen. I, Chas. Fleming, of Chesterfield county, being of sound mind and memory, do make, publish, and ordain this my last will and testament. After my just and legal debts are fully paid, I will and desire the following distribution of all my real and personal estate, both in the State of Virginia and of Kentucky.

First. I give all my real estate which lies and is situated in the State of Kentucky to my brother, Wm. Fleming, and my two nephews, John Bernard, Jr., and Richard Bernard, in trust, to be sold for the benefit of my creditors, and to pay such legacies as shall be hereafter directed; which real estate consists of the following tracts and parcels, viz: One tract of land lying in the county of Mason, and situated on the waters of the Ohio river, containing eighteen
146 thousand acres; also one other tract, lying in the same county and situated on the same waters, containing twenty thousand acres; also one other tract, in the same county, &c., containing sixteen thousand one hundred and ninety-one acres; also one tract, lying at the mouth of Glen's creek, about four miles from Frankfort, only one moiety of the above tracts and parcels of land being mine, is all that [I] give the aforesaid trustees for the above-mentioned purposes.

After my debts are discharged by the money arising from the sale of my land by the above-mentioned trustees, of the remainder or residue of the money arising from the sale of any land I give and bequeathe one-fifth part to my two nieces, Mary Lewis and Susanna Lewis, their heirs and assigns, forever.

Item. I give and bequeathe to my brother, Wm. Fleming, John Bernard, Jr., and Richard Bernard, in trust for my sister, Mary Bernard, or for her surviving children, two-fifths of the aforesaid residue or remainder to them, their heirs or assigns, forever. By which I mean that the aforesaid two-fifths shall be appropriated by the said trustees to the support and maintenance of my sister, Mary Bernard, for her life, and after her death to be equally di-
147 vided among such of her children as shall survive her, or their representatives.

Item. I give and bequeathe the remaining two-fifths of the first-mentioned residue to my brother, Wm. Fleming, his heirs, or assigns forever.

I appoint my brother, William Fleming, sole executor of this my last will and testament, hereby revoking all former wills.

In witness whereof, I have hereunto set my hand and seal, this 8th day of October, one thousand seven hundred and ninety-three.

Test: CHAS. FLEMING. [SEAL.]

ROBERT HASKINS, JR.
JOHN BINFORD.
JOSIAH LEAK, JR.

Endorsed on the back as follows: Will — Chas. Fleming, dec'd, 1794. Dec. proved by Haskins & Binsford, & O. R. Recorded & examined.

Deed. Bryans to Sam'l Sackett.

MAY 1st, 1795.

This indenture, made the first day of May, in the year of our Lord one thousand seven hundred and ninety-five, between John
148 Bryan, of Somerset county, & State of New Jersey, and Marian, his wife, and Wm. Bryan and Elizabeth, his wife, of the State of Kentucky, of the first part, and Samuel Sackett, of the city of New York, of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of one thousand eight hundred and eighty-eight pounds, eighteen shillings & eight pence, current money of the State of New York, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, enfeoffed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, enfeoff, and confirm unto the party of the second part, in their actual possession now being by virtue of a bargain and sale, to him thereof made by indenture bearing date the day before the day of the date of these presents, and also by virtue of the statute for transferring of uses into possession, and their heirs and assigns forever, all those two certain tracts, pieces, and parcels of land situate, lying, and being in the late Commonwealth of Virginia, now State of Kentucky, in the late county of Mason: the one tract
149 containing twenty thousand acres, being patented to Chas. Fleming by the said Commonwealth of Virginia, lying and being on the waters of the Ohio, and bounded as follows, to wit: Beginning at the south corner of an entry in the name of Gen'l James Wilkinson & Company of thirty-seven thousand two hundred and fifty-six acres, at five white oaks & three black oaks; thence south forty-five degrees west two thousand five hundred and sixty poles, crossing several waters, to six white oaks; thence north forty-five degrees east two thousand five hundred and sixty poles, crossing several waters, to two white oaks, two black oaks, and two sourwoods; thence south forty-five degrees east one thousand two hundred and fifty poles, crossing several waters, to the beginning. The second of the said tracts, containing eight thousand three hundred and thirty-four acres, being a part of a tract of eighteen thousand acres, patented by the said Commonwealth to the said Chas. Fleming, lying and being in the late county of Mason, on the waters of the Ohio, and bounded as follows, to wit: Beginning at the east corner of William Fitzhugh's twelve thousand acre entry at four hickories and six white oaks, standing in a bottom;
150 thence south forty-five degrees west one thousand two hundred and eighty poles, crossing branches, two red oaks, two dogwoods and a maple; thence south forty-five degrees east two thousand two hundred and fifty poles, crossing branches, to five

white oaks; thence north forty-five degrees east one thousand two hundred and eighty poles, crossing branches, to a stake; thence north forty-five degrees west two thousand two hundred and fifty poles, crossing branches, to the beginning. The said eight thousand three hundred and thirty-four acres, part of the last-named tract, and bounded as follows, to wit: Beginning at the most southerly corner of the said tract at the said five white oaks, thence north forty-five degrees east two thousand two hundred and eighty poles, to a stake; thence north forty-five degrees west from the said two last-mentioned bounds so far as to include the said eight thousand three hundred and thirty-four acres, and to contain in the whole twenty-eight thousand three hundred and thirty-four acres, together with all and singular the profits, privileges, advantages, emoluments, rights, members, hereditaments, & appurtenances whatsoever to the same belonging or in any wise appertaining, and
151 the reversions and remainder thereof; and also all the estate, right, title, interest, property, possession, claim, and demand of the said parties of the first part, of, in, and to the same, and of, in, and to every part and parcel thereof.

To have and to hold unto the said parties of the second part, their heirs and assigns forever; and, lastly, that the said parties of the first part, and their heirs, all lawfully claiming or to claim by, from, or under them, shall and will at all times hereafter, at the expense of the said party of the second part, their heirs and assigns, further do acknowledge and execute all such further and other deed or deeds, conveyance or conveyances in the law, as their counsel, learned in the law, shall reasonably advise and require.

In witness whereof, the parties these presents have hereunto interchangeably set their hands and seals, the day and year above written.

JOHN BRYAN. [SEAL.]
MARIAN BRYAN. [SEAL.]
WM. BRYAN. [SEAL.]
ELIZABETH BRYAN. [SEAL.]

Signed, sealed, and delivered in the presence of—
JOSEPH LINN, JR,
SAMUEL M. VICKER.
MARIA BRYAN.

We, Robert Blair and Nicholas Arrowsmith, two of the jus-
152 tices of the peace of the county of Somerset, in the State of New Jersey, do hereby certify that on the twenty-eighth day of September, in the year of our Lord one thousand seven hundred and ninety-five, personally appeared before us the within-named John Bryan and Marian, his wife, who reside in the said county of Somerset, and signed, sealed, and acknowledged the within deed in our presence, acknowledged that they executed the same for the uses and purposes therein mentioned, and we, finding no material erasures or interlineations, do allow the same to be recorded.

As witness our hands.

ROBT BLAIR.
NICHOLAS ARROWSMITH.

I, the underwritten clerk and prothonotory of the county of Somerset, in the State of New Jersey, do certify that Robert Blair & Nicholas Arrowsmith, Esqs., are justices of the peace of the county of Somerset aforesaid, and that full faith and credit is due to all acts done by them.

In witness whereof, I have hereunto affixed the seal of the said county and subscribed my name, this first day of October, 1795.

F. ———,
Clerk of Somerset.

153 At a court held for Mason county, this 22d day of Dec., 1795, this indenture of bargain and sale from John & Wm. Bryan to Sackett, was presented in court and acknowledged by Wm. Bryan, a party thereto, and, together with the indorsements thereon, was ordered to be recorded.

Teste: T. MARSHALL, JR., *C. M. C.*
A copy.
Attest: MARSHALL KEY, *C. M. C. C.*
No endorsements.

Deed.—John Bryan to Sam'l Sackett. April 4th, 1797.

This indenture ——— day of January, in the year one thousand seven hundred & ninety-seven, between John Bryan & Maryan, his wife, of the township of Bedminster, county of Somerset, and State of New Jersey, of the one part, and Samuel Sackett, merchant, of the city of New York, of the other part, witnesseth: That the said John Bryan and Maryan, his wife, in consideration of the sum of ten shillings nine pence per acre, current money of the city of New York, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, and released, and
154 by these presents do grant, bargain, sell, alien, remise, and release unto the said Samuel Sackett, and to his heirs and assigns forever, all those parcels and tracts of land hereinafter mentioned, situated, lying, and being in the county of Mason, and State of Kentucky, on the waters of the Ohio, a part of which said parcel or tract of land the said John Bryan holds by virtue of a deed executed by the executors of Col. Chas. Fleming of the State of Virginia, and a part by a patent from the Governor of the State of Kentucky, reference being had to said deed and patent may more fully appear, and are bounded as follows, viz: Sixteen thousand one hundred and ninety-one acres of land on the waters of Ohio, and beginning at the south corner of an entry in the name of Wm. Payne, for fourteen hundred six and a half acres at ten white oaks and four black oaks, on the top of a hill; also a white oak marked W. R. P. S., another J. S.; thence north forty-five degrees east four hundred poles, with said Payne's line to Chas. Craddock's line, to an ash, gum, white oak, hickory, poplar, and sugar tree, and a beech marked I. S., standing in a bottom on the east side of a small run; thence south forty-five degrees east one hun-
155 dred and ninety-four poles, with Craddock's line to a corner, two white oaks, two maples, sour-trees, two sugar

trees, also a beech marked I. S.; thence north forty-five degrees east three hundred and eighty poles, with Craddock's line, to a forked maple, gum, poplar, black oak, and two sour-woods; thence south sixty-five degrees east one thousand and eighty poles to Enoch O'Brien's south corner, two white oaks, and two black oaks; thence north forty-five degrees east six hundred poles, with O'Brien's line, to Minor Winn's line, two white oaks and sour-wood; thence south forty-five degrees, east six hundred and thirty-five poles to four white oaks; thence north forty-five degrees east eight hundred poles, to said Winn's east corner, three white oaks and two sour-woods; thence south forty-five degrees east one hundred and fifty-nine poles, with a line of Chas. Fleming's eighteen thousand acre survey, passes his corner and binding on Gen'l James Wilkinsons & Co., to the north corner of Chas. Fleming's twenty thousand acre entry, two white oaks, two black oaks, and two sour-woods; thence south forty-five degrees west two thousand five hundred and sixty poles, with said Fleming's line, to his west corner, six white oaks; thence north forty-five degrees west two thousand and
156 seven poles, to the beginning. The tract of eighteen thousand acres is bounded as follows, to wit: Beginning at the east corner of Wm. Fitzhugh's twelve thousand acre entry, four hickories and six white oaks standing in a bottom; thence south forty-five degrees west twelve hundred and eighty poles to two red oaks, two dogwoods, and a maple; thence south forty-five degrees east two thousand two hundred and fifty poles, to five white oaks; thence north forty-five degrees east twelve hundred and eighty poles, to a stake, thence north forty-five degrees west two thousand two hundred and fifty poles, to the beginning. And a twenty thousand acre entry is bounded as follows, to wit: Beginning at the south corner of an entry in the name of James Wilkinson & Company of thirty-seven thousand two hundred and fifty-six acres, five white oaks and three black oaks; thence south forty-five degrees west two thousand five hundred and sixty poles, to three black oaks and a sour-wood; thence north forty-five degrees west twelve hundred and fifty poles, to six white oaks; thence north forty-five degrees east two thousand five hundred and sixty poles, to two white oaks, two black oaks, and two sour-woods; thence south forty-five degrees east twelve hundred and fifty poles, to the beginning.
157 And also a nine thousand and six hundred acre entry is bounded as follows, to wit: Beginning on Richard Adams' line of his twenty thousand acre survey, eight hundred poles north forty-five degrees west from his east corner at a white oak and hickory; thence north forty-five degrees west one thousand six hundred and eighteen poles with said line to his north corner of his twenty thousand acre survey to "B," a white oak and black oak; thence north forty-five degrees east nine hundred and forty-nine poles to "C," a white oak and red oak; thence south forty-five degrees east one thousand six hundred and eighteen poles to "D," two black oaks and hickory; thence south forty-five degrees west nine hundred & forty-nine poles, to the beginning; the four several tracts of land above mentioned containing sixty-three thousand seven hundred

and ninety-one acres: To have and to hold the same, with their and every of their appurtenances (excepting twenty-eight thousand three hundred and thirty-four acres of land, herein included in the above quantity which was heretofore deeded to the said Samuel Sackett by Wm. Bryan and the said John Bryan, which will fully appear having reference to said deed), to the said Samuel Sackett and his
158 heirs forever, to the only proper use and behoof of him, the said Samuel Sackett, and his heirs forever, and to the said John Bryan and Maryan, his wife, and their heirs, warrant and agree to and with the said Samuel Sackett, and his heirs forever, shall and will warrant and defend forever by these presents from the claim and demand of him, the said John Bryan, and Maryan, his wife, and their heirs, and all persons claiming for or under them or either of them, but not from the claim or demand of any other person or persons whatsoever.

In testimony whereof, the said John Bryan and Maryan, his wife, have hereunto affixed their hands and seals, the day, month, and year first written.

JOHN BRYAN. [SEAL.]
MARYAN BRYAN. [SEAL.]

Signed, sealed, and delivered in presence of—
ABR'M LAURANCE.
JOHN HENRY.

We, Robert Blair and William W. Eowen, Esq'r's, two of the justices of the peace in and for the county of Somerset, in the State of New Jersey, do hereby certify that on the third day of April, in the year of our Lord one thousand seven hundred and ninety-seven, personally appeared before us the within-named John Bryan
159 and Maryan, his wife, who reside in said county of Somerset, acknowledged in our presence that that they executed the same for the uses and purposes therein mentioned, and the said Maryan, being examined by us apart from her husband, acknowledged that she executed the same freely and voluntarily, and freely relinquished her right of dower in the lands in the said deed mentioned.

Do allow the same to be recorded, as witness our hands.

ROBERT BLAIR,
WILLIAM W. EOWEN.

I, Frederick Frelingheyser, clerk of the county of Somerset, in the State of New Jersey, do certify that the above-named Robert Blair & Wm. W. Eowen, whose names in their proper handwriting are subscribed to the above certificate of acknowledgment, are justices of the peace in and for the county of Somerset.

In witness whereof, I have hereunto set the seal of said county, and subscribed my name, this 4th day of April, 1797.

[L. S.] FRED. FRELINGHEYSER, *Cl'k.*

KENTUCKY, *set:*

I, Archilles Sneed, clerk of the court of appeals for the
160 State aforesaid, do hereby certify that the foregoing deed, with the testimonials thereto annexed, was produced to me in my office, in Frankfort, on the seventh day of July, 1816, and that the same is truly recorded.

In testimony whereof, I have hereunto set my name the day and year aforesaid.

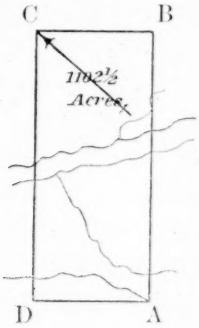
ARCHILLES SNEED. 42. [SEAL.]

The above is endorsed on the back as follows: John Bryan to Samuel Sackett. Deed. 35,456 acres. Kentucky.

161 *Copy Survey. Fishback & Berry. Oct. 10th, 1797.*

OCT. YE 10TH, 1797.

Surveyed for Josiah Fishback & Wm. Berry, 1102½ acres of land, by virtue of part of an entry made Oct. the 31st, 1783, on part of a T. warrant, No. 19184, situate, lying, & being in the county of Ma-



Scale 400 poles p'r inch.

son & on the waters of Little Sandy, & bounded as follows, to wit: Beginning at two white oaks and 4 beeches, east corner to said Fishback & Berry's former survey of 1,102½ acres, & running N. 45 E. 680 poles to three white oaks & 2 sour-woods; thence N. 45 W. 260 poles to 3 white oaks & 1 red oak, thence S. 45 W. 680 poles to a stake, on Alex. Brown's line of 16,000 acres; thence S. 45 E. 260 poles to the beginning.

WM. ROUTT, *D. S. M. C.*
MOSES SNEDECER,
THOS. CUNNINGHAM, *C. C.*
SAMUEL WELLS, *Marker.*
H. LEE, *S. M. C.*

Ec'd:

A copy.
Test:

JOHN M. FOSTER, *R. L. Off.*

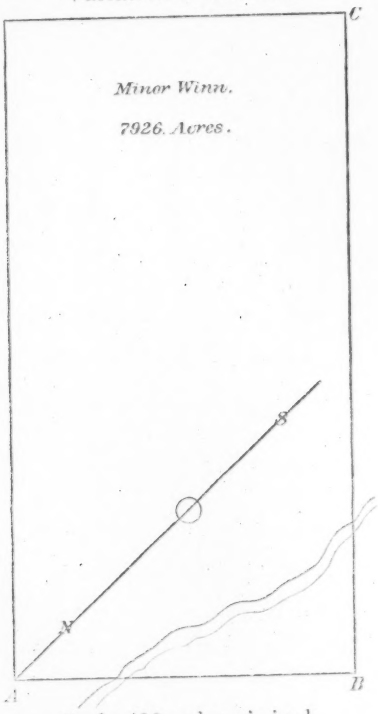
Endorsed on the back as follows: Fishback & Berry. 1,102½ acres. Copy survey. Fee, 25 cents. Examined.

162 *Copy Survey. Minor Winn. July 22d*, 1799.

MARCH 15TH, 1790.

Surveyed for Minor Winn, 7,926 acres of land, by virtue of an entry made on two Treasury warrants, No-. 19190 & 19189, entered Oct. 31st, 1783, lying and being in the county of Mason, on the

Variation 3° 50′ east.



Scale 400 poles p'r inch.

waters of the Ohio, beginning at the east corner of George Graham's entry of 4,857½ acres at A, a white oak, then binding on said Graham's line the whole length, & crossing his corner S. 46° W., 800 poles in all, crossing a large creek to B, two beeches, poplar, & ash standing in a large bottom; thence S. 45 E. 1,580 poles, crossing a large creek, to four white oaks; thence N. 45 E. 800 poles to three white oaks & two sour-woods; thence N. 45 west 1585 poles to the beginning.

J. STERRETT, *D. S. M. C.*
WM. RAMSEY,
JAS. HODGEKINS, *C. C.*
HENRY LEE, *S. M. C.*
PHILIP STUCKER, *Marker.*

Ec'd:

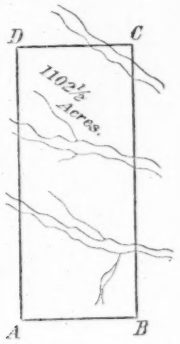
A copy. Test: JOHN M. FOSTER, *R. L. O.*

Endorsed on the back as follows: Minor Winn. 7926 acres. Copy survey. Fee, 25 cts. Grant issued 22d July, '99. Examined.

163 *Copy Survey, Fishback & Berry, Feb'y 5th*, 1800.

OCT. 10TH, 1797.

Surveyed for Josiah Fishback & Wm. Berry, 1,102½ acres of land by virtue of an entry made October ye 31st, 1783, on a Treasury warrant, No. 19184, situate, lying, & being in the county of Mason



Scale 400 poles p'r inch.

& on the waters of Little Sandy, & bounded as follows, to wit: Beginning at 4 white oaks, 4 red oaks, & 4 chestnut oaks, south corner, to Alexander Brown's 16,000 acres, & running S. 45° E. 260 poles to 6 poplars & five white oaks; thence N. 45° E. 680 poles to two white oaks & 4 beeches; thence N. 45 W. 260 poles to a stake on said Brown's line; thence with said line S. 45° W. 680 poles to the beginning.

BYRAM ROUTT, *D. S. M. C.*

THOS. CUNNINGHAM &
MOSES SNEDECER, *C. C.*
SAMUEL WELLS, *Marker.*

Ec'd: H. LEE, *S. M. C.*

A copy. Test: JOHN H. FOSTER, *R. L. Off.*

Endorsed on the back as follows: Fishback & Berry. 1,102 acres. Copy survey. Fee, 25 cents. Grant issued 5th Feb'y, 1880. Examined.

164 *Copy Ord. App. Com'rs.*

GREENUP CO., *ss:*

Sept. County Court, 1805.

HUGHES *vs.* SHORE'S HEIRS, &c.

Ordered, that Robert Poage, John Poage, James Warnock, Sam'l William Sorvey, Thomas Warrey, Jr., and William Fuqua be ap-

pointed commissioners within this county for the purpose of dividing and conveying of lands between residents and non-residents of this State, who, or any two of them, when called on for that purpose by the citizens of this Commonwealth, or the owners of lands who are non-residents, or their agents, may make division and conveyance of such lands, agreeably to the act of an Assembly in such case made and provided.

A copy. Test: JOHN HOCKADAY, *C. G. C. C.*

Endorsed on the back as follows: Copy ord. app. com'r. Hughes *vs.* Shore's Heirs & Johnson.

Deed. Sackett's Trustees to Beebee. Sept. 19th, 1807.

Quit-claim.

To all people to whom these presents shall come, Greeting:

165 Know ye, that Samuel Corp and Isaac Titford, by his att'y Samuel Corp, trustees of the estate of Samuel Sackett, in the State of New York, for and in consideration of the sum of one hundred and five dollars, lawful money of the United States, to them in hand paid by Sam'l Beebee, of the city of New York, merchant, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released, and forever quit-claimed, and by these presents do remise, release, and forever quit-claim unto the said Sam'l Beebee, in his full possession and seizin, and to his heirs and assigns forever, all the estate, right, title, interest, use, trust, property, claim, and demand whatsoever, both at law and in equity of them, the said Samuel Corp & Isaac Titford, of, in, to or out of, all and singular those certain pieces or parcels of land lying and being in county of Mason & State of K'y, described in a certain deed of conveyance thereof made by John Bryan and Maryan Bryan, his wife, of the township of Bedminster, county of Somerset, and State of New Jersey, to Samuel Sackett, merchant, of the city of New York, said deed bearing date the twenty-
166 eighth day of January, one thousand seven hundred and ninety-seven, reference being made to the said deed, and the patents therein mentioned will more fully appear, said lands containing as p. c. said deed & patents, thirty-five thousand four hundred and fifty-six acres, subject to such reservations as is contained in said deed, which said land was conveyed by the said Sam'l Sackett, with other land to the above-mentioned trustees, and sold for the benefit of his, the said Sackett's, creditors, said deed of conveyance to the trustees bearing date the thirtieth day of July, 1798, the first trustees being John Goodwin, John Ramsey, and George Douglas, who afterwards conveyed to the present trustees above mentioned; to have and to hold unto the said Sam'l Beebee, his heirs and assigns, to their own proper use and behoof, forever, so that neither the said Samuel Corp & Isaac Titford, trustees as aforesaid, their heirs or assigns, nor any other person or persons in trust for them, or in the name or names, or in the name, right, or stead of any of them, shall or will, can or may, by any ways or means what-

soever, hereafter have claim, challenge, or demand any right, interest, title, or estate, of, in, to, or out of the said premises
167 above described, and hereby released; but that they, the said Sam'l Corp & Isaac Titford, trustees as aforesaid, their heirs and assigns, and every of them, from all estate, right, title, interest, property, claim, and demand whatsoever, of, in, to, or out of the said premises, or any part thereof, are, is, and shall be, by these presents, forever excluded and debarred.

In witness whereof, the said Sam'l Corp & Isaac Titford, by his att'y, Sam'l Corp, have hereunto set their hands and seal-, this nineteenth day of September, in the year of our Lord one thousand eight hundred and seven.

SAM'L CORP. [SEAL.]
ISAAC TITFORD, [SEAL.]
By His Attorney.

Sealed and delivered in the presence of—
WM. MEASE.
THOMAS COOPER.

STATE OF NEW YORK, *ss:*

On this nineteenth day of September, in the year of our Lord one thousand eight hundred and seven, before me personally came and appeared Sam'l Corp, known to me to be the grantor described in, and who executed the within written deed, who did acknowledge
168 that he had executed the same; he also acknowledged that he had executed the same as the att'y of and for Isaac Titford, the other grantor therein described.

I allow it to be recorded.

THOMAS COOPER,
Master in Chancery.

CITY OF NEW YORK, *ss:*

By Jacob Radcliff, mayor of the city of New York.

Be it remembered that on the 29th day of March, 1816, personally appeared before me, the said mayor, Sam'l Corp, to me personally known to be the person mentioned in the within instrument, who acknowledged that he executed the same as his voluntary act and deed, for the uses and purposes therein mentioned; he also acknowledged that he executed the same as the att'y of Isaac Titford, the other grantor therein named.

In testimony whereof, I have hereunto subscribed my name and have caused the seal of mayoralty of said city to be affixed, the day and year above written.

[L. S.] JACOB RADCLIFF.

KENTUCKY, *set:*

I, Archilles Sneed, clerk of the court of appeals for the State aforesaid, do hereby certify that the foregoing deed, with the testi-
169 monials thereto annexed, was produced to me, in my office, in Frankfort, on the seventh day of July, 1816, and that the same is duly recorded.

In testimony whereof, I have hereunto set my name, the day and year aforesaid.

ARCHILLES SNEED,
C. C. A. (42.)

Endorsed on the back as follows: Sackett's trustees to Beebee. Deed. Sam'l Corp & Isaac Titford, trustees of the estate of Samuel Sackett. Tax & fee, $1.82.

Beebee to Caldwell. Co. Deed. April 29th, 1808.

This indenture made this 29th day of April, 1808, between Sam'l Beebee, of the city of New York, by Peter Mills, his attorney-in-fact, of the one part, and Alexander Caldwell, of Brook county, in Virginia, of the other part, witnesseth:

That the said Sam'l Beebee, for and in consideration of two hundred and fifty dollars to the said Sam'l Beebee paid by said Alexander Caldwell, the receipt whereof acknowledged, hath granted, bargained, sold, and forever quit-claimed, and by these presents doth grant, bargain, sell, and quit-claim unto the said Alexander
170 Caldwell, and to his heirs and assigns forever, all the estate, right, title, interest, and claim whatsoever, both at law and equity of him, the said Samuel Beebee, of, in, and to all, and being near a certain tract or parcel of land, containing eighteen thousand acres, lying and being in the county of Mason, in the State of Kentucky, granted by the Commonwealth of Virginia aforesaid to one Chas. Fleming, and by him conveyed to John & Wm. Bryan, and said John Bryan to Samuel Sackett, and by said Sackett, who conveyed the same, together with other tracts, to his trustees, Samuel Corp & Isaac Titford, who conveyed the same, together with one other tract of sixteen thousand one hundred and ninety acres, to the said Sam'l Beebee by deed, bearing date the 19th day of Sept., 1807, which thereby more fully appear; the patent for the same 18,000 acres is dated the 21st day of April, 1792, and is bounded as follows: Beginning at the E. corner of Wm. Fitzhugh's 12,000 acre entry, at four hickories and six white oaks standing in a bottom; thence south 45 degrees west 1,280 poles, crossing branches to two red oaks, two dogwoods, and a maple; thence S. 45 degrees E. 2,250 poles, crossing branches to five white oaks; thence N. 45 degrees E. 1,280 poles, crossing branches to a stake; thence N. 45 degrees W. 2,250 poles, crossing branches to the beginning.

171 To have and to hold the said granted premises unto the said Alexander Caldwell, his heirs and assigns, to their only proper use and behoof forever, so that the said Samuel Beebee, his heirs & assigns, nor any other person claiming by any way or means whatever, hereafter have claim or demand, and right, title, or interest or estate of, in, or to the said premises above described & hereby conveyed, but that the said Samuel Beebee, his heirs & assigns, & every of them from all estate, right, title, and claim whatsoever of, in, or to the said eighteen thousand acres, or any part thereof, is, and shall be, by these presents, forever excluded and debar-ed.

In witness whereof, the said Sam'l Beebee, by his said att'y, have hereunto set his hand and seal the day and year first above written.

Signed, sealed, and delivered as the act & deed of Sam'l Beebee, by Peter Mills, his said attorney.

SAM'L BEEBEE, [SEAL.]
By PETER MILLS, *His Att'y.*

JAMES CALDWELL.
JOHN R. FRAZER.
ANDREW THOUGHNESS.

STATE OF OHIO, *Muskingdum County:*

Personally appeared before us, the subscribers, two justices of the peace, in and for said county, Sam'l Beebee, by his att'y,
172 Peter Mills, and acknowledged the within instrument of writing to be his voluntary act & deed for the purposes within mentioned.

Given under our hands and seals, this eighth day of February, 1814, at Zanesville.

CHRISTIAN SPANGLER, [L. S.]
Just. of the Peace.
WM. CRAIG, [L. S.]
Just. of the Peace.

In testimony that Christian Spangler & Wm. Craig, before whom this writing was acknowledged, are and were at the time thereof lawful justices of the peace in this county, duly commissioned and acting as such, and to whose official acts full faith and credit are due, I have hereunto set my hand and seal of office, this 8th Feb'y, A. D. 1814.

[SEAL.] JOHN E. STOCKTON, *C. M. C.*

STATE OF KENTUCKY, *sct:*

I, Willis A. Lee, clerk of the general court for the State aforesaid, do certify that this deed, from Samuel Beebee, by his attorney, Peter Mills, to Alexander Caldwell, was produced to me, in my office, on the 20th day of February, 1814, and the same, with the testi-
173 monial thereon endorsed, is duly recorded in my said office.

In testimony whereof, I have hereunto set my hand, the day and year first above written.

Att.: WILLIS A. LEE, *Clk.*
A copy. Teste: WILLIS A. LEE, *Clk.*

Endorsed on the back as follows: Beebee, by Mills, his attorney, to Caldwell. Co. deed. Exam'd for Jas. Hughes, Esq.

Deed. A. Caldwell to P. Mills. April 30th, 1808.

This indenture, made and concluded upon this 30th day of April, one thousand eight hundred and eight, between Alexander Caldwell, of Brooke county, Virginia, of the one part, and Peter Mills, of the same county, of the other part, witnesseth:

That the said Alexander, for and in consideration of one thousand dollars to him paid by the said Peter Mills, hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell, to the said Peter Mills one undivided half of a tract of land containing eighteen thousand acres, situate in Mason county, State of Kentucky, which was granted by patent from the State of
174 Virginia to Charles Fleming, bearing date the 21st April, 1792, and which was on the 29th instant conveyed by said Peter Mills, as att'y-in-fact for Sam'l Beebee, of the city of New York, to the said Alex'r Caldwell, to have and to hold the undivided moiety of the said eighteen thousand acres to the said Peter Mills, his heirs and assigns, forever, to the only proper use and behoof of the said Peter Mills and his heirs forever. It is understood that the said Alexander conveys only all his right, title, and interest in and to the moiety aforesaid, and in case of a deficiency in the title to the said land the said Caldwell is nohow responsible therefor, and the said Caldwell, for himself and his heirs, the said moiety to the said Peter Mills, his heirs and assigns, will warrant and forever defend against the claim of him, the said Alexander Caldwell, and his heirs, & all persons claiming under him.

In witness whereof, the said Alex'r Caldwell hath hereunto set his hand and seal, the day and the year first above written.

ALEX'R CALDWELL. [SEAL.]

Test: W. M. CLUNEY.
CHARLES HALLAN.
JEFFERY PRICE.
BENJAMIN JENKINS.
SAM'L THOMPSON.

175 THE STATE OF OHIO, *Muskingdum County:*

Be it remembered that this day personally appeared before us, the subscribers, justices of the peace in and for said county, Alexander Caldwell, & acknowledged the within instrument of writing to be his voluntary act & deed, and desires the same to be recorded as such.

Given under our hands & seals this 11th day of May, A. D. 1809.

SAM'L THOMPSON, [L. S.]
Just. of the Peace.
CHRISTIAN SPANGLER, [L. S.]
Just. of the Peace.

STATE OF KENTUCKY, *set:*

I, Willis A. Lee, clerk of the general court for the State aforesaid, do certify that the within indenture was produced to me on the 23rd July, 1813, together with the certificate thereon endorsed, and the same is truly recorded in my office.

Att: WILLIS A. LEE, *C. G. C.*

STATE OF OHIO, } ss:
Muskingdum County, }

I do hereby certify that the above-named Sam'l Thompson and Christian Spangler, Esq'rs, signed to the above acknowledge-
176 ment, were at the time of signing thereof two acting justices of the peace within and for said county, and that due faith and credit is and ought to be given to all their official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of the court of common pleas of said county, at Zanesville, this 25th day of May, A. D. 1811.

[SEAL.] ABEL LEWIS,
Clk C. C. S. M. C.

Endorsed on the back as follows: Deed. A. Caldwell to Peter Mills. Recorded and examined. Att: Willis A. Lee.

Co-Deed. Mills to Hughes. Nov. 5th, 1808.

This indenture made this 5th day of November, 1808, between Peter Mills, of Zanesville, in the State of Ohio, and James Hughes, of Fayette county, in the State of Kentucky, witnesseth: That the said Peter Mills, for & in consideration of the sum of seven
177 hundred dollars, to him in hand paid, or secured to be paid, by the said James at & before the ensealing and delivery of these presents, doth grant, bargain, and sell unto the said James Hughes, his heirs and assigns, one undivided moiety of 18,000 acres of land, situated in Greenup county (formerly Mason), which was granted by patent from the then Governor of Virginia to Chas. Fleming, on the 21st day of April, 1792, and bounded as follows, to wit: Beginning at the east corner of Wm. Fitzhugh's twelve thousand acre entry, four hickories and six white oaks standing in a bottom; thence south 45 degrees west 1,280 poles to two red oaks, two dogwoods, and a maple; thence south 45 east 2,250 poles to five white oaks; north 45 east 1,280 poles to a stake; thence N. 45° west 2,250 poles to the beginning, which 18,000 acres of land was conveyed by Chas. Fleming to Jno. Bryan, by John Bryan to Sam'l Sackett of the city of New York, by Samuel Sackett to his trustees, and by the trustees to Samuel Beebee, and by the said Peter Mills, as att'y in fact for said Beebee, to Alexander Caldwell, and one undivided moiety thereof by Alexander Caldwell to Peter Mills, with all and singular the appurtenances to the said tract of land belonging or in anywise appertaining.

178 To have and to hold the said tract of land with the appurtenances to the said James Hughes, his heirs and assigns, to his & their only proper use and behoof forever. And the said Peter Mills, the said undivided moiety against all claiming under him, to the said James Hughes, shall and will warrant and defend by these presents; but in case the land is taken by any other claim than Fleming's, he is not to refund the purchase-money or be liable for any damage whatsoever.

In testimony whereof the said Peter Mills hath set his hand & affixed his seal, the day and date first before written.

PETER MILLS. [SEAL.]

Sealed & delivered in presence of—
JAMES MORRIS.
WILLIAM H. CAMPBELL.
JAMES L. TAYLOR.
NATHAN SIDWELL, JUN.

STATE OF KENTUCKY, *Mason County,* } *sct:*

I, Marshall Key, deputy clerk of the court aforesaid, do certify this conveyance from Peter Mills to James Hughes was proved by the oath of James Morris, Wm. H. Campbell, & James L. Taylor, witnesses thereto, before me, according to law, and a true copy
179 is of record in the clerk's office of said county.
Given under my hand, this 7th day of July, 1809.
MARSHALL KEY.

STATE OF KENTUCKY, *Greenup County,* } *To wit:*

I do hereby certify this indenture was produced to me as clerk of the county court of said county on the 30th day of August, 1809, and by virtue of a certificate thereon endorsed from the clerk of Mason county court, the same, together with the foregoing certificate, has been duly recorded in my office.
Attest: JOHN HOCKADAY.
A copy.
Teste: JOHN HOCKADAY, *C. G. C.*

Endorsed on the back as follows: Mills to Hughes. Co.-deed.

Deed. Mills to Hughes. July 7th, 1809.

This indenture made this 5th day of November, 1808, between Peter Mills, of Zanesville, in the State of Ohio, and James Hughes, of Fayette county, in the State of Kentucky, witnesseth:
180 That the said Peter Mills for and in consideration of the sum of seven thousand dollars to him in hand paid, or secured to be paid by the said James at and before the ensealing & delivery of these presents, hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell unto the said James Hughes, his heirs and assigns, one undivided moiety of 18,000 acres of land, situated in Greenup county (formerly Mason), which was granted by patent from the then Governor of Virginia to Chas. Fleming on the 21st day of April, 1792, and is bounded as follows, to wit: Beginning at the E. corner of Wm. Fitzhugh's twelve-thousand acre entry, four hickories and 6 white oaks standing in a bottom; thence S. 45 west 1,280 poles to two red oaks, two dogwoods, & a maple; thence S. 45 E. 2,250 poles to five white oaks; thence N. 45° E. 1,280 poles to a stake; thence N. 45° W. 2,250 poles to the beginning, which 18,000 acres of land was conveyed by Charles Fleming to John Bryan, by John Bryan to Sam'l Sackett, of the city of New York; by Sam'l Sacket to his trustees, and by the trustees to

Sam'l Beebee, and by the said Peter Mills as att'y in fact to Alex'r Caldwell, and one undivided moiety thereof, by Alexander
181 Caldwell, to Peter Mills, with all and singular the appurtenances to the said tract of land belonging or in anywise appertaining.

To have and to hold the said tract of land, with the appurtenances, to the said James Hughes, his heirs and assigns, to his and their only proper use and behoof forever; and the said Peter Mills, the said undivided moiety against all claiming under him, to the said Jas. Hughes, shall and will warrant and defend by these presents; but in case the land is taken by any other claim than Fleming's, he is not to refund the purchase-money, or be liable to any damage whatsoever.

In testimony whereof, the said Peter Mills hath set his hand & affixed his seal, the day and date first before written.

PETER MILLS. [SEAL.]

Sealed & delivered in presence of—
JAS. MORRIS, p'd 8th May, 1809.
WM. H. CAMPBELL, p'd 7th July, 1809.
JAS. L. TAYLOR, p'd 8th May, 1809.
DAVID BURNELL.
NATHAN SIDWELL, JUN'R.

STATE OF KENTUCKY, *Mason County,* } *sct:*

I, Marshall Key, clerk of the county aforesaid, do certify
182 that this conveyance from Peter Mills to James Hughes was proved by the oath of James Morris, Wm. H. Campbell, and James L. Taylor, witnesses thereto, before me, according to law, and a true copy is of record in the clerk's office of said county.

Given under my hand, this 7th day of July, 1809.

MARSHALL KEY.

STATE OF KENTUCKY, *Greenup County,* } *To wit:*

I do hereby certify that this indenture was produced to me, as clerk of the county court of said county, on the 30th day of August, 1809, & by virtue of a certificate thereon endorsed from the clerk of Mason county, the same, together with the foregoing certificate, has been duly recorded in my office.

A copy.
Teste:

JOHN HOCKADAY.

Endorsed on the back, as follows: Deed. Mills to Hughes. Recorded book L, page 67. Exam'd. *Exam'd.* Recorded book A, page 206.

Deed. Beebee to Hughes. August 29th, 1809.

183 This indenture, made this 5th day of November, 1808, between Samuel Beebee, of the city of New York, of the one

part, and James Hughes, of the county of Fayette, in the Commonwealth of Kentucky, of the other part, witnesseth:

That the said Samuel Beebee, for and in consideration of the sum of three hundred dollars, to the said Samuel in hand paid, or secured to be paid, at or before the ensealing and delivery of these presents by the said James, has granted, bargained, and sold, and by these presents doth grant, bargain, and sell unto the said James Hughes, his heirs and assigns, all that tract of land, containing 16,191 acres by survey, which was granted to Charles Fleming by patent from the then Governor of Virginia on the twenty-first day of April, 1792, situate, lying and being in Greenup county, in the Commonwealth of Kentucky, by the following boundaries, to wit:

Beginning at the south corner of an entry in the name of Wm. Payne for 1,406¼ acres at ten white oaks and four black oaks standing on the top of a hill, also a white oak marked W. R. P. S., another I. H.; thence north 45, east 400 poles with said Payne's line to Chas. Craddock's lines to an ash, gum, white oak, hickory, poplar, and sugar tree, and a beech marked I. S., standing in a little bot-
184 tom on the east side of a small run; thence S. 45, east 194 poles with said Craddock's to his south corner, two white oaks, two maples, two sour-woods, and two sugar trees, also a beech marked I. S.; thence north 45°, east 380 poles with said Craddock's line to a forked maple, gum, poplar, black oak, and two sour-woods; thence south 65°, east 1,080 poles to Enoch O'Bryan's south corner, two white oaks and two black oaks; thence N. 45°, east 600 poles with said O'Bryan's line to Minor Winn's line, two white oaks and sour-wood; thence south 45°, east 635 poles with said Winn's line to his south corner, four white oaks; thence north 45°, east 800 poles with said Winn's line to his east corner, three white oaks and two sour-woods; thence south 45°, east 159 poles with a line of Chas. Fleming's 18,000 acre survey, passing his corner and binding on Gen'l James Wilkinson & Company, to the north corner of Chas. Fleming's 20,000 acre entry, two white oaks, two black oaks, and two sour-woods; thence south 45°, west 2,560 poles with said Fleming's line to his west corner, six white oaks; thence north 45°, west 2,007 poles to the beginning; which tract of land was conveyed by the said Chas. Fleming to Jno. Bryan, and by Jno. Bryan to Samuel Sackett, of the city of New York, by the said Sackett con-
185 veyed to trustees for the benefit of his creditors, and by the said trustees to the said Samuel Beebee, with all and singular the appurtenances to the said tract of lands belonging or in anywise appertaining, with all the estate of the said Samuel Beebee of, in, and to the same.

To have and to hold the said tract of land, with the appurtenances, to the said James Hughes, his heirs and assigns, to his and their only proper use and behoof forever. And the said Beebee covenants to warrant the said land to the said Hughes from all claiming under himself; but if the land is taken by any other claim he is not to refund the purchase-money, or be subject to any loss or damage whatsoever.

In testimony whereof, Peter Mills, by virtue of a power of attorney

to him directed by the said Samuel Beebee, bearing date the 21st day of September, 1807, hath set the hand & affixed the seal of the said Samuel Beebee, the day and date first before written.

SAMUEL BEEBEE. [SEAL.]
By his att'y, PETER MILLS.

Sealed & delivered in presence of—
JAS. MORRIS, P. 8th May, 1809.
W. H. CAMPBELL, P. 9th July, 1809.
JAS. L. TAYLOR, P. 8th May, 1809.
DAVID BURNELL.

186 STATE OF KENTUCKY, } *sct:*
Mason County, }

I, Marshall Key, dep'y clerk of the county aforesaid, do certify that this deed of conveyance from Sam'l Beebee by Peter Mills, his att'y-in-fact, to James Hughes, was proved by the oath of James Morris, Wm. H. Campbell, & Jas. L. Taylor, witnesses thereto, before me according to law, and a true copy is admitted to record in the office of the clerk of said county.

Given under my hand, this 7th day of July, 1809.

MARSHALL KEY.

STATE OF KENTUCKY, } *To wit:*
Greenup County, }

I do hereby certify that this indenture was produced to me as clerk of the county court of said county, on the 30th day of August, 1809, and by virtue of the foregoing certificate from the clerk of Mason county, the same, together with the said certificate, has been duly recorded in my office.

A copy. Test: JOHN HOCKADAY.

Endorsed as follows: Beebee, by his att'y-in-fact, to Hughes. Deed. Recorded, page 68, book L. Exam'd Aug. 35th, 1809. Recorded, book A, page 200. Exam'd.

187 *Will of Chas. Fleming. Jan'y 26th,* 1811.

In the name of God, amen. I, Chas. Fleming, of Chesterfield county, being of sound mind and memory, do make, publish, and ordain this my last will and testament: After my just and legal debts are fully paid, I will and desire the following distribution of all my real & personal estate, both in the State of Virginia and of Kentucky:

First. I give all my real estate which lies and is situated in the State of Kentucky to my brother, Wm. Fleming, and my two nephews, John Bernard, Jun'r, and Richard Bernard, in trust, to be sold for the benefit of my creditors, and to pay such legacies as shall be hereafter directed, which real estate consists of the following tracts & parcels, (viz:) One tract of land lying in the county of Mason and situated on the waters of the Ohio river, containing eighteen thousand acres; also one other tract lying in the same county

and situated on the same waters, containing twenty thousand acres; also one other tract in the same county, and containing sixteen thousand one hundred and ninety-one acres; also one tract lying on the mouth of Glen's creek, about four miles from Frankfort, only one moiety of the above tracts and parcels of land being mine, is
188 all that give the aforesaid trustees for the above-mentioned purposes. After my debts are discharged by the money arising from the sale of my land by the above-mentioned trustees, of the remainder or residue of the money arising from the sale of my land I give & bequeath one-fifth part to my two nieces, Mary Lewis & Susanna Lewis, their heirs or assigns, forever.

Item. I give & bequeath to my brother, Wm. Fleming, John Bernard, Jr., and Richard Bernard, in trust for my sister, Mary Bernard, or for her surviving children, two-fifths of the aforesaid residue or remainder to them, their heirs or assigns, forever. By which I mean that the aforesaid two-fifths shall be appropriated by the said trustees to the support and maintenance of my sister, Mary Bernard, for her life, and after her death to be equally divided among such of her children as shall survive her, or their representatives.

Item. I give & bequeath the remaining two-fifths of the first mentioned residue to my brother, Wm. Fleming, his heirs & assigns, forever. I appoint my brother, Wm. Fleming, sole executor of this my last will and testament, hereby revoking all former wills.

In witness whereof, I have hereunto set my hand & seal, this
189 eighth day of October, one thousand seven hundred and ninety-three.

CHAS. FLEMING. [SEAL.]

Teste:
ROBERT HASKINS, JR.
JOHN BINSFORD.
JOSIAH LEAK, JR.

In Chesterfield County Court.

DEC. 8*th*, 1794.

The last will & testament of Chas. Fleming, dec'd, was presented in court by Wm. Fleming, ex'or, therein named, proved by the oaths of Rob't Haskins & John Binsford, witnesses thereto, and ordered to be recorded.

And on the motion of the said executor, who gave bond and took the oath required by law, a certificate of having obtained a probate in due form is granted herein.

STATE OF VIRGINIA, *Chesterfield County*, } *To wit:*

I, Thomas Watkins, clerk of Chesterfield county court, do certify that the foregoing is truly copied from the records of my office.

In testimony whereof, I have hereunto subscribed my name & have caused the official seal of the said county to be affixed, this 20th day of January, anno Dom. one thousand eight hundred and eleven, and in the 35th year of our foundation.

T. WATKINS, *C.*

190 STATE OF VIRGINIA, } *set:*
Chesterfield County, }

I, Daniel Boisseau, presiding justice of the peace for the county aforesaid, do certify that the foregoing certificate of attestation, which is signed by Thomas Watkins, clerk of Chesterfield county court, is made in due form of law.

Given under my hand & seal, this 26th day of January, anno Dom. 1811, and in the 35th year of our Independence.

DANIEL BOISSEAU. [SEAL.]

At a county court held for Greenup county on Monday, the 22d day of Feb'y, 1819, this copy of the last will & testament of Chas. Fleming, dec'd, was proved to be a correct copy of the original will of the said testator by the oaths of Josiah Leak, Jr., & Rob't Haskins, Jr., two of the subscribing witnesses to said original will, & that the said will was signed & published by the said Chas. Fleming, as his last will & testament, & that he was of sound & disposing mind & memory; that they signed their names as subscribing witnesses to said will in the presence and with the consent of the testator, & thereupon the said copy is ordered to be recorded, which is accordingly done.

Attest: JOHN HOCKADAY,
C. G. Co. Ct.

Endorsed on the back as follows: Will of Chas. Fleming, dec'd. Josiah Leak, Rob't Haskins.

191 *Chancery Spa.*

JAMES HUGHES *vs.* SHORE'S HEIRS, &c.

The Commonwealth of Kentucky to the sheriff of Greenup county, Greeting:

We command you to summon Jane Grayson Shore, Elizabeth Smith Shore, and Mary Louisa Shore, heirs and representatives of Thomas Shore, deceased, and George Johnson, to appear before the judges of our circuit court for the circuit and county aforesaid, at the court-house, on the first day of our next July term to answer to a bill in chancery exhibited against them by James Hughes, in our said court, and this they shall in nowise omit, and have then there this writ.

Witness John Hockaday, clerk of our said court, at the court-house, this 10th day of July, 1865, and in the XXIV year of the Commonwealth.

JOHN HOCKADAY.

Endorsed as follows:

Geo. Johnson not found. Jane Grayson Shore, Elizabeth Smith Shore, Mary Louisa Shore not inhabitants of my bailwick.

JACOB KORUM, *S. G. Co.*

Endorsed on the back as follows: James Hughes *vs.* Shore's Heirs & Johnson. Ch'y Spa. To July, 1815.

192 *Bill.*

To the honorable the judges of the Greenup circuit court, in chancery sitting, humbly complaining sheweth unto your honors your orator, James Hughes:

That on the 25th day of April, in the year 1785, Charles Fleming, since deceased, made the following entry with the county surveyor, (to wit:) "Charles Fleming enters 26,373 acres of land on part of a T. W's No. 20345, beginning at the south corner of Wm. Payne's 1,406½ acre entry, thence north 45° east 400 poles to Charles Chaddox's line; thence south 45° east 194 poles to his corner; thence north 45° east 380 poles; thence south 45° east to Enoch O'Bryan's south corner; thence north 45° east 600 poles to Minor Winns' line; thence south 45° east 635 poles to Minor Winn's south corner; thence north 45° east 751 poles to the north corner of Chas. Fleming's 20,000 acre entry; thence south 45° west 2,560 poles to his west corner; thence north 45° west to the beginning." And having caused 16,191 acres of the same to be surveyed strictly according to location and to law on the 15th day of March, 1790, obtained a patent for the said quantity of 16,191 acres, bearing date the 21st day of April, 1792. Your orator shews that the said Charles Fleming departed this life about the —— day of ——, ——, but had previously, (to wit,) on the 8th day of October, in the year 1793,

193 made and published his last will and testament in writing, which is duly proved and recorded in the county court of Chesterfield, in Virginia. That by the said will he appointed his brother, Wm. Fleming, and his two nephews, John Bernard, Junior, and Richard Bernard, trustees, to sell this tract of land, amongst other tracts for the benefit of his creditors, and gave them full power to convey the same. Your orator shows that by virtue of the said will the said trustees sold and conveyed the said tract of 16,191 acres of land to a certain Jno. Bryan, of New Jersey. That Jno. Bryan and Mary Anne sold and conveyed the same to Samuel Sackett, of the city of New York. That the said Samuel Sackett conveyed the said tract of land to trustees for the benefit of his creditors, who, under the trust and authority vested in them, sold and conveyed the same to Samuel Beebee, also of the city of New York, who sold and conveyed the same to your orator. Your orator shews that being about the —— day of ——, about to convey certain land to Thos. Bodley and Chas. Humphreys in trust to provide for the payment of certain sums of money, he included this tract in the said deed, but the purposes of the said trust being performed, the said trustees have reconveyed the same to him, and the legal title is now vested in him.

194 Your orator will be ready to produce the said patent and deeds shewing the deduction of title in proper time, or whenever the court shall require it. Your orator further shews that on the 20th day of January, in the year 1786, Jno. Marshall, Junior, made the following entry with the county surveyor (to wit): "Jno. Marshall, Junior, assignee of Thomas Marshall, withdraws 8,000 acres from his entry of 10,000 acres on a T. W's, No. 16454, sec. 19,

book page 82, on a large So. fork of Sandy that heads with the head of Licking, beginning at a large, forked ash tree with some red paint on it, and a beech tree with Thos. Clark's name cut on it, two sugar trees, poplar and ash and two beech trees, which trees are the beginning corner of Jno. Tompkins' survey of 7,991¾ acres; thence running west 1,200 poles, thence south 1,066 poles, thence east 1,200 poles, thence north 1,066 poles to the beginning." And on the 12th day of February, 1786, caused the same to be surveyed so as to interfere almost wholly with the said survey of 16,191 acres, and the locator's interest, which was one-half, having been assigned to Thomas Shore and Christopher McConnico, and the other moiety having been assigned to Thomas Marshall, since deceased, a patent issued to the said Thomas Marshall for one moiety and to the said
195 Shore and McConnico for the other moiety. Your orator further shews that he has by an agreement of compromise settled the dispute respecting the interference as to the said Marshall's part with his executors, Thomas Marshall, Alex'r K. Marshall, and Humphrey Marshall, by which agreement they agreed to blend, as to the said moiety, the two claims together as far as they interfered, and each to hold one-half of the said moiety.

Your orator further shews that Thomas Shore has departed this life, leaving Jane Grayson Shore, Elizabeth Smith Shore, and Mary Louisia Shore, infants under the age of 21, his heirs and legal representatives, all of whom he prays may be made defendants to this bill, and that a guardian may be appointed to defend for them. Your orator further shews that the said Christopher McConnico has conveyed his fourth part to George Johnston, who your orator prays may be made a defendant to this bill, who is in possession and pretends to set up title not only under this claim, but to have some other. Your orator had well hoped, as his entry was special, well surveyed, and elder than the defendants, and as they must well know the entry of Marshall to be wholly vague and uncertain, which he charges it is, that the said defendants would have yielded
196 up possession to him, and conveyed their legal title so improperly obtained. But now so it is that the said defendants, combining, &c., refuse so to do, all which actings, &c., are contrary to equity, &c. In tender consideration whereof, and forasmuch as your orator is remedyless by the strict rules of the common law, to the end therefore that the said defendants may be compelled true and perfect answer to make to all and singular the premises as fully as if here again repeated and interrogated, and more particularly that the said Johnson may set forth what claim he has to the said land, or any part thereof, whether only under the said McConnico, or under what claim he sets up title. And that by a decree of this court the said defendants may be compelled to convey to your orator their several titles to the interference, and that your orator may receive such other and further relief as to equity and good conscience belongs.

May it please your honors, the premises considered, to grant to your orator the Commonwealth's writ of subpœna, &c.

J. HUGHES, *in P. P.*

197 *A. L. S. Chancery Spa. Oct.*, 1815.

The Commonwealth of Kentucky to the sheriff of Greenup county, Greeting:

We again command you to summon Jane Grayson Shore, Elizabeth Smith Shore, & Mary Louisa Shore, heirs & representatives of Thos. Shore, dec., and George Johnson to appear before the judges of our circuit court for the circuit & county of Greenup, at the court-house, on the first day of our next Oct. term, to answer to a bill in chancery exhibited against them by James Hughes ——, in our said court, and this they shall in nowise omit, and have then —— there this writ.

Witness John Hockaday, clerk of our said court, at the court-house, this 26th day of Sept., 1815, & in the XXIV year of the Commonwealth.

JOHN HOCKADAY.

Endorsed as follows:
Came to hand the 30th Sept., 1815.

JACOB KOUNS, *S. G. C.*

Executed on Geo. Johnston. Jane Grayson Shore, Elizabeth Smith Shore, and Mary Louisa Shore are not inhabitants of my bailwick.

JACOB KOUNS, *S. G. C.*

Endorsed on the back as follows: James Hughes *vs.* Thos. Shore's heirs and Geo. Johnson. A. S. Chancery spa to Oct., 1815.

198 *Affidavit. Oct. 12th*, 1815.

FRANKLIN COUNTY, *set:*

Personally appeared before me, a justice of the peace for the said county, James Hughes, who, being duly sworn, made oath that Beverly Robinson, Benj'n Ledyard, Wm. Meuse, & Thos. Cooper, of the city of New York, are material witnesses for him in the suit in chancery depending, in the Greenup circuit court, wherein the said Hughes is compl't & George Johnson & others are defendant, & that he cannot safely go to trial without the testimony of the said witnesses.

Given under my hand this 12th day of October, 1815.

OLIVER G. WAGGONER, *J. P.*

Endorsed on the back as follows: James Hughes *vs.* Geo. Johnson and Shore's heirs. Affidavit.

Notice to Johnson, &c., to take Depo. January 26th, 1816.

FRANKFORT, *Jan'y 20th*, 1816.

Take notice that on the 20th day of March next, at the City Hotel, in the city of New York, between the hours of ten
199 in the morning and five in the afternoon, I shall take the depositions of Beverly Robinson, Benj. Ledyard, Wm. Meuse, & Thomas Cooper, to be read in evidence in the suit in chancery

depending & undetermined in the Greenup circuit court, wherein I am compl't & you are defendant.

JAMES HUGHES.

To George Johnson and Jane Grayson Shore, Elizabeth Smith Shore, & Mary Louisa Shore, heirs and representatives of Thos. Shore, dec'd.

Endorsed on the back as follows: Hughes to Johnson, &c. Notice to take depos. in New York.. Capt. George Johnson.

Power of Attorney. J. Titford to Sam'l Corp. March 29th, 1816.

To all to whom these presents shall come, Greeting:

Whereas Sam'l Corp & Isaac Titford, of the city of New York, merchants, & John Douglas, late of the same place, now dec'd, were on the twenty-seventh day of February, one thousand seven hundred and ninety-nine, appointed by sundry creditors of Samuel Sackett, who had become interested in the property conveyed & in the trusts declared in and by an indenture bearing date the thirtieth day of July, one thousand seven hundred and
200 ninety-eight, & made between Samuel Sackell, then of the city of New York, merchant, of the one part, Jno. Goodwin, John Ramsey, and George Douglass, Jr., of the second part, in trust for all the creditors of the said Sam'l Sackett, who should before the expiration of six calendar months from the date of the said indenture, executed to the said Sam'l Sackett, an absolute and effectual release and discharge of all their demands against him, the said Sam'l Sackett. And whereas, in pursuance of the said appointment, & of a certain deed or deeds of conveyance made in consequence thereof, the said Sam'l Corp, Isaac Titford, and George Douglass, Jun'r, did become seized and possessed of the said property and estate, subject to the trusts aforesaid. And whereas the said Geo. Douglass, Jr., is now deceased, and, whereas the said Isaac Titford is about to depart from this State on a voyage to the West Indies, and is desirous as far as in him lies to authorize and empower him, the said Sam'l Corp, to execute all the trusts upon which they hold the property and estates aforesaid, which trusts will particularly appear by the deeds and conveyances by virtue of which they so hold the said property and estates, reference being thereunto had:

[Two twenty-five cent U. S. internal revenue stamps.]

201 Now know ye, that the said Isaac Titford hath nominated, constituted, and appointed, and hereby doth nominate, constitute, and appoint, the said Samuel Corp his true and lawful attorney in the premises, and doth hereby fully authorize and empower his said attorney, jointly with the said Sam'l Corp, in his capacity as one of the said trustees, to sell and dispose of the said property and estates, and of all, any, and every part thereof, for such price and prices as he may deem proper, fair, and reasonable, and to do, make, execute, and suffer and cause to be done, made, and executed and suffered all such acts, deeds, grants, conveyances,

and assurances and releases as may be necessary, proper, and expedient to be made, done, executed, or suffered by them, the said Sam'l Corp and Isaac Titford, touching the premises, or any part or parts thereof, and generally to do in relation to the said property and estates, and every part thereof, and to the trusts aforesaid, all and every act, deed, matter, and thing which the said Isaac Titford might or lawfully could do in relation to, or touching the same if he were personally present. He, the said Isaac Titford, ratifying or hereby confirming whatever his said attorney shall lawfully do or cause to be done in the premises by virtue of these presents.

202 In witness whereof, he hath hereunto set his hand and seal, the twenty-eighth day of January, in the year of our Lord one thousand eight hundred and two.

IS. TITFORD. [SEAL.]

Sealed and delivered (being first duly stamped) in the presence of—

EPHREME VANKIRK.
ROB'T BACH.

STATE OF NEW YORK, *ss:*

On this 29th day of March, 1816, before me came Rob't Bach, known to me to be the subscribing witness to the within power of attorney, who, being by me duly sworn, deposeth: That he saw Isaac Titford, known to him to be the person described in the said within power of attorney, duly executed the same, and that he did subscribe his name as a witness thereto.

I allow the same to be recorded.

JOS. C. COOPER,
Master in Chancery.

Recorded in the office of the register in and for the city and county of New York, in Lib. No. 113 for conveyances, &c., page 632, the 29th day of March, 1816, at ¾ past 10 a. m.

Examined by—

W. T. SLOCUM, *Register.*

203 In pursuance of a dedimus directed to us, two of the assistant justices in the city of New York, having the power of taking affidavits & exercising certain other duties of justices of the peace, from the Greenup circuit court, in the Commonwealth of Kentucky, to take depositions of sundry witnesses to be read in evidence in the suit in chancery depending and undetermined in the said court, wherein James Hughes is compl't & George Johnston & Shore's Heirs are def'ts, we have caused to come before us John Torot, of the city of New York, Esq., at the office of Henry & Edmund Wilkes, attorneys-at-law, this twenty-sixth day of August, one thousand eight hudred and sixteen, who, being of full age and first duly sworn, deposes & says: That the power of attorney executed by Isaac Titford to Sam'l Corp, dated the twenty-sixth day of January, one thousand eight hundred and two, marked "B" and annexed to the deposition of Rob't Bach, is in the handwriting of

him, this deponent. And he further deposes and says that he has seen Isaac Titford sign his name, and that upon examining the signature "Is. Titford" set and subscribed to the above-mentioned power of att'y, he verily believes the same to be the true
204 and proper handwriting and signature of the said Isaac Titford. And further he, this deponent, saith not.

JOHN TOROT.

Sworn to before us, the day and year first before written.

PH. TABELE, *Asst. Justice.*
ELISHA MORRILL, " "

No endorsements.

Affidavit of James Hughes.

MASON COUNTY, *To wit:*

APRIL 19TH, 1816.

Personally appeared before me, a justice of the peace for the said county, James Hughes, who being duly sworn, made oath that since the obtaining the order to take depos. in the suit in chancery depending and undetermined in the Greenup circuit court, in which he is compl't, & Geo. Johnston and Shore's heirs are def'ts, he has been to the city of New York for the purpose of obtaining testimony. That he was there informed and believes that Benj. Ledyard, one of the witnessses whose depo. he had an order to take, was dead, and also that Thos. Cooper, another of them, was in such bad health that his attendance could not be got at the place appointed. This deponent says that he has been informed and believes that
205 Beverly Robinson, Sam'l Corp, Jno. Goodwin, Jno. Ramsey, Rob't Lennox, John Taylor, Rob't Bach, Peter Jay Monroe, John Torot, Sam'l J. Beebee, and John Wilkes are material witnesses for him in the said chancery suit, and also in the several ejectments also depending and undertermined in the said circuit court of Greenup, wherein Doe, on the demise of the deponent, is pl't'ff and James Howe, Rezin Virgin, John Oberman, James Ward, Ephraim Goble, Rachael Virgin, Alexander Wilson, & Thompson Ward are defendants, and that the said witnesses all reside in the city or vicinity of New York.

Sworn to before me, a justice of the peace for the said county, this 19th day of April, 1816.

G. BROWN.

Endorsed on the back as follows: Hughes *vs.* Shore's heirs, &c Doe *vs.* Roe, &c. Aff'd.

Deeds. J. Hughes to G. Johnson & Shore's Heirs. April 26th, 1816.

CITY AND COUNTY OF NEW YORK, *ss:*

We, Philip Tabele and Elisha Morrill, two of the assistant
206 justices in and for the city and county of New York to whom the annexed *dedimus* is directed, do hereby certify that in conformity thereto we have caused to come before us, on the twenty-

sixth and twenty-seventh days of August instant, between the hours of ten in the forenoon & five o'clock in the afternoon of the said day, at the office of Edmund & Henry Wilkes, Esq'rs, attorneys-at-law, in the said city, Samuel Corp, John Goodwin, Rob't Lennox, Rob't Bach, John Torot, & John Wilkes, who, being by us duly sworn & examined, did severally depose to the truth of the matters and facts set forth in their depositions hereunto annexed.

In testimony whereof, we have hereunto set our hands this 28th Aug., 1816.

PH. TABELE,
Ass't Justice.
ELISHA MORRILL,
Ass't Justice.

Commonwealth of Kentucky to Phillip Tabele & Elisha Morrill, gentlemen, assistant justices of the peace of the city of New York, State of New York, Greeting:

Know ye, that we, trusting to your fidelity and provident circumspection in diligently examining Beverly Robinson, Samuel Corp, John Goodwin, John Ramsey, Robert Lennox, John Taylor, Robert Bach, Peter Jay Monroe, John Torot, Samuel J. Beebe, &
207 John Wilkes, as witnesses in behalf of Jas. Hughes in a certain suit in chancery in our circuit court for the circuit and county of Greenup, now depending and undetermined between said James Hughes, compl't, and George Johnson and Thos. Shore's heirs, def'ts, and we therefore command you, or any two of you, that at a certain time and place, by you to be appointed, you assemble yourselves and the witneses aforesaid before you, or any two of you, you call and cause to come, and them diligently examine, on oath, touching the premises, and their examination taken before you you shall without delay send and certify us thereof enclosed & this writ.

Witness John Hockaday, clerk of our said court, at the court-house, this 26th day of April, 1816, and in the XXIV year of the Commonwealth.

JOHN HOCKADAY.

In pursuance of a *dedimus* directed to us, two of the assistant justices in the city of New York, having the power of taking affidavits and exercising certain other duties of justices of the peace, from the Greenup circuit court, in the Commonwealth of Kentucky, to take depositions of sundry witnesses to be read in evidence in the suit in chancery depending and undetermined in the said circuit court wherein James Hughes is
208 compl't and Geo. Johnson & Shore's heirs are def'ts, we have caused to come before us Sam'l Corp, of the city of New York, merchant, at the office of Henry & Edmund Wilkes, attorneys-at-law, this 26th day of August, one thousand eight hundred and sixteen, between the hours of ten in the morning and five in the afternoon, who being of full age, and first duly sworn, deposes and says: That he has seen Sam'l Beebee write and sign his name,

and that upon a careful inspection of the letter marked "A," and annexed to this deposition, he verily believes the same to be an original letter in the handwriting of the said Samuel Beebee, and that the signature "Sam'l Beebee," set and subscribed thereto is of the proper handwriting and signature of the said Samuel Beebee.

And he further deposes, that he has refused, and still does refuse, to deliver up to Jas. Hughes, of Kentucky, a deed of trust made by John Goodwin, John Ramsey, and Geo. Douglass, Jr., to Nathaniel Lawrence, bearing date the twenty-eighth day of May, one thousand seven hundred and ninety-nine, and delivered to him as one of the trustees for the creditors of Sam'l Sackett, because he says that he was not able when called upon by the said Mr. Hughes for
209 the same to get the said deed recorded in the office for recording deeds in this city of New York, on account of the death of both the attesting witnesses.

And further he, this deponent, saith not.

SAM'L CORP.

Sworn to before us, the day and year first before mentioned.

PH. TABELE, *Ast. Just.*
ELISHA MORRILL, *Ast. Just.*

NEW YORK, *Jan'y 20th*, 1808.

DEAR SIR: Your favor of the 24th December, is received. The object of this is to authorize you to sell and make a conveyance by release of the lands confided to your care in Kentucky, belonging to me, agreeably to and by virtue of the power of attorney I executed to you while in this city.

Having confidence that you will strive to promote my interest in the disposal of the land,

I am, sir, respectfully, your humble servant,

SAM'L BEEBEE.

In pursuance of a *dedimus* directed to us, two of the assistant justices in the city of New York, having the power of taking affidavits and exercising certain other duties of justices of the peace
210 from the Greenup circuit court, in the Commonwealth of Kentucky, to take the depositions of sundry witnesses to be read in evidence in the suit in chancery depending and undetermined in the said circuit court, wherein Jos. Hughes is compl't & Geo. Johnston and Shore's heirs are def'ts, we have caused to come before us John Goodwin, of the city of New York, physician, at the office of Henry & Edmund Wilkes, attorneys-at-law, this 28th day of August, one thousand eight hundred & sixteen, between the hours of ten in the morning and five in the afternoon, who, being of full age, and first duly sworn, deposeth and saith: That he, this deponent, together with John Ramsey & Geo. Douglass, Jun'r, of the city and State of New York, merchants, did execute a deed of trust to Nathaniel Lawrence, of the city and State aforesaid, bearing date the twenty-eighth day of May, one thousand seven hundred and ninety-nine; that he, this deponent, did sign & seal the said

instrument with his own proper hand and seal, and was present and did see the said John Ramsey & George Douglass, Jun'r, execute the same; and he further doposeth & saith that he hath since heard and verily believes that the said John Ramsey and George Douglass, Jr., hath departed this life; and further he, the
211 said deponent, saith not.

JOHN GOODWIN.

Sworn to before us, the day and date first above mentioned.
PH. TABELE, *Ass't Justice.*
ELISHA MORRILL, *Ass't Justice.*

In pursuance of a *dedimus* directed to us, two of the assistant justices in the city of New York, having the power of taking affidavits and exercising certain other duties of justices of the peace from the Greenup circuit court, in the Commonwealth of Kentucky, to take depositions of sundry witnesses to be read in evidence in the suit in chancery depending and undetermined in the said circuit court, wherein Jas. Hughes is compl't and Geo. Johnston & Shore's heirs are deft's, we have caused to come before us Robert Lennox, of the city of New York, merchant, at the office of Henry & Edmund Wilkes, attorneys-at-law, this twenty-seventh day of August, one thousand eight hundred and sixteen, between the hours of ten in the morning & five in the afternoon, who, being of full age and first duly sworn, deposes and says: That he has seen George Douglass, Jr., sign his name, & that upon examination of the signature
212 "Geo. Douglass, Jun'r," set & subscribed to an original deed of trust made by John Goodwin, John Ramsey, and George Douglass, Jr., to Nathaniel Lawrence, and bearing date the twenty-eighth day of May, one thousand seven hundred and ninety-nine, he verily believes the same to be the proper handwriting and signature of the said Geo. Douglass, Jr.

And he futher deposes and says that the said Geo. Douglass, Jun'r, is now deceased.

ROB'T LENNOX.

Sworn to before us, the day and year first before mentioned.
PH. TABELE,
Ass't Justice.
ELISHA MORRILL,
Ass't Justice.

In pursuance of a dedimus directed to us, two of the assistant justices, in the city of New York, having the power of taking affidavits & exercising certain other duties of justices of the peace, from the Greenup circuit court in the Commonwealth of Kentucky, to take the depo's of sundry witnesses, to be read in evidence in the suit in chancery depending and undetermined in the said circuit court, wherein Jas. Hughes is compl't & Geo. Johnston & Shore's Heirs are defendantt, we have caused to come before us Robert Back, of the city of New York, merchant, at the office of Henry

& Edmund Wilkes, attorneys-at-law, this twenty-seventh day
213 of August, one thousand eight hundred and sixteen, between the hours of ten in the morning and five in the afternoon, who, being of full age and first duly sworn, deposes and says:

That having seen a power of attorney, executed by Isaac Titford to Sam'l Corp, on the twenty-sixth day of Jan'y, one thousand eight hundred and two, to which he and Euphame Vankirk were attesting witnesses, marked "B," and annexed to this deposition, he says, that the said Isaac Titford executed and delivered the same in his presence, and that he and the said Euphame Vankirk (appear to have) signed their names as witnesses thereto; that the signature, "Is. Titford," was written by the said Isaac Titford, and that the name of "Robert Bach" was written by him, this deponent; and further he, this deponent, saith not.

ROBERT BACH.

Sworn to before us, the day and date first before mentioned.
(Appear to have)—these words were interlined before sworn.
ELISHA MORRILL, *Ass't Justice.*
PH. TABELE, " "

Deed for 54,191 *Acres of Land. June 8th*, 1816.

214 Know all men by these presents, that whereas John Bryan the grantor within named, with Maryan, his wife, having this day, by a certain deed indented, sold and conveyed unto Samuel Sackett the premises mentioned within, and every part and parcel thereof, with their and every of their appurtenances, to have and to hold unto him, the said Sam'l Sackett, his heirs and assigns, forever: Now, therefore, know ye, that I, the said John Bryan, in order more fully to confirm and establish the said conveyance, and to vest in the said Samuel Sackett, as well the said premises within contained, as the benefits of the grants, covenants and agreements for confirmation of the title thereof, in the within deed contained, for divers good causes and considerations now thereunto moving, for and in consideration of the sum of five shillings to me in hand paid, the receipt whereof is hereby acknowledged, have given, granted, transferred, assigned, and set over, and by these presents, do give, grant, transfer, assign, and set over, the premises within contained, and all and singular the covenants, grants, and agreements within expressed, accompanying and being with the said premises unto the said Sam'l Sackett, his heirs and assigns, to and for his and their own proper use and benefit, hereby authorizing and empower-
215 ing the said Samuel Sackett, his heirs and assigns, on any eviction, expulsion, impeachment, or failure of title in the premises, in my name or otherwise, as he may be advised by his counsel learned in the law, but for his and their own proper use and benefit to ask, demand, sue for, and recover of and from the said Wm. Fleming, "John Bernard, Richard Bernard, & Charles Marshall," the grantors within named, all such damages, costs, & charges, as I, myself, or my assigns, by virtue of the said grants, cove-

nants, and agreements might or could lawfully ask, demand, sue for, and recover.

In testimony whereof, I have hereunto set my hand seal, this twenty-eighth day of January, in the year one thousand seven hundred and ninety-seven, 1797.

JOHN BRYAN, [SEAL.]

Sealed & delivered in the presence of—
(The names John Bernard, Richard Bernard, & Charles Marshall, first interlined between the fifth and sixth-lines from the bottom.)

ABR'M LAWRENCE.

This indenture, made this thirty-first day of December, in
216 the year one thousand seven hundred & ninety-six, between Wm. Fleming, John Bernard, and Richard Bernard & Chas. Marshall by William Marshall, his att'y-in-fact, of the State of Virginia, of the one part, and John Bryan of the State of New Jersey, of the other part, witnesseth: That whereas a certain Chas. Fleming, late of the county of Chesterfield and Commonwealth of Virginia, now dec'd, was seized and possessed of three tracts or parcels of land situate, lying, and being in the county of Mason and Commonwealth of Kentucky, the one for sixteen thousand one hundred and ninety-one acres, one other for eighteen thousand acres, and the third for twenty thousand acres, amounting in the whole to fifty-four thousand one hundred and ninety-one acres; and whereas the before-named Charles Marshall was entitled to one moiety of the said tracts or parcels of land, as having located the same for the said Chas. Fleming, and the said Chas. Marshall having sold to John & Wm. Bryan thirteen thousand three hundred and thirty-four acres of the said land, did, in the lifetime of the said Chas. Fleming, request a conveyance for that amount to be made the said John & Wm. Bryan, which was accordingly done by deed, which did not ascertain the bounds of the same or the tract out of which it
217 was to be taken, but only conveying that quantity out of the aforesaid three tracts; and whereas the said Chas. Fleming, dec'd, after having made the said conveyance to the said John and William Bryan, duly made & published his last will and testament in writing, bearing date the eighth day of October, in the year one thousand seven hundred and ninety-three, in which will he gave among other lands the said three tracts or parcels of land abovementioned to the said Wm. Fleming, John Bernard, & Richard Bernard in trust, to be sold for the benefit of his creditors, and to pay such legacies as are in the said will thereafter mentioned and directed, as by the said last will and testament of record, in the court of Chesterfield county, will more fully and at large appear; and whereas the said Chas. Marshall is still entitled in equity to thirteen thousand seven hundred and sixty-one and one-half acres of the said land, and the said Wm. Fleming, John Bernard, & Richard Bernard & Charles Marshall have agreed that the whole of the said three tracts of land not conveyed to the said John & Wm. Bryan

by the said Chas. Fleming, dec'd, should be sold, & the purchase money arising therefrom to be divided as the different parties may be entitled to receive: Now this indenture witnesseth,
218 that the said Wm. Fleming, John Bernard, and Richard Bernard, by virtue of the power and authority to them given, and in pursuance of the trust in them reposed in & by the said last will and testament, and for and in consideration of the sum of one thousand three hundred and sixty-six pounds eighteen shillings and sixpence, current money of Virginia, to them in hand paid by the said John Bryan, the receipt whereof they do hereby acknowledge, and thereof do release, acquit, & discharge him and his heirs forever; and the said Chas. Marshall, by the said Wm. Marshall, his att'y-in-fact, in consideration of the agreement aforesaid, have granted, bargained, & sold, and by these presents do grant, bargain, and sell, to the said John Bryan, & to his heirs forever, all the residue of the said three tracts of land not before conveyed to John & Wm. Bryan, and amounting to forty thousand eight hundred and fifty-seven acres, which said tracts or parcels of land were granted by the Commonwealth of Virginia to the said Chas. Fleming by patents bearing date on the first day of April, in the year one thousand seven hundred and ninety-two, and duly recorded in the register's office for the aforesaid Commonwealth—reference
219 being thereto had will more fully appear—and are bounded as follows, to wit: The sixteen thousand one hundred and ninety-one acre tract on the waters of the Ohio, and beginning at the south corner of an entry in the name of Wm. Payne for fourteen hundred six and an half acres, at ten white oaks & four black oaks on the top of a hill; also a white oak marked W. R. P. S., another I. S.; thence north forty-five degrees east four hundred poles, with said Payne's line to Chas. Braddock's line, to an ash gum, white oak, hickory, poplar, and sugar tree, and a beech marked I. S. standing in a bottom on the east side of a small run; thence south forty-five degrees east one hundred and ninety-four poles, with Craddock's line to his corner, two white oaks, two maples, two sugar trees, two sour trees, also a beech marked I. S.; thence north forty-five degrees east three hundred and eighty poles, with Craddock's line to a forked maple, gum, poplar, black oak, and two sour-woods; thence south sixty-five degrees east one thousand and eighty poles, to Enoch O'Brien's south corner, two white oaks, two black oaks; thence north forty-five degrees east six hundred poles, with O'Brien's line to Minor Winn's line, two white oaks and sour-woods; thence south forty-five degrees east six hundred and thirty-five poles, to four white oaks; thence north forty-five degrees
220 east eight hundred poles to said Winn's east corner, three white oaks and two sour-woods; thence south forty-five degrees east one hundred and fifty-nine poles, with a line of Chas. Fleming's eighteen-thousand-acre survey, passing his corner and binding on Gen'l James Wilkinson & Co. to the north corner of Chas. Fleming's twenty-thousand-acre entry, two white oaks, two black oaks, and two sour-woods; thence south forty-five degrees west

two thousand five hundred and sixty poles, with said Fleming's line to his west corner, six white oaks; thence north forty-five degrees west two thousand and seven poles, to the beginning.

The tract of eighteen thousand acres is bounded as follows, to wit: Beginning at the east corner of Wm. Fitzhugh's twelve thousand-acre entry four hickories and six white oaks standing in a bottom; thence south forty-five degrees west twelve hundred and eighty poles to two red oaks, two dogwoods, and a maple; thence south forty-five degrees east two thousand two hundred and fifty poles to five white oaks; thence north forty-five degrees east twelve hundred and eighty poles to a stake; thence north forty-five degrees west two thousand two hundred and fifty poles to the beginning.

And the twenty thousand acre entry is bounded as follows,
221 to wit: Beginning at the south corner of an entry in the name of James Wilkinson & Company of thirty-seven thousand two hundred fifty-six acres five white oaks and three black oaks; thence south forty-five degrees west two thousand five hundred and sixty poles to three black oaks and a sourwood; thence north forty-five degrees west twelve hundred and fifty poles to six white oaks; thence north forty-five degrees east two thousand five hundred & sixty poles to two white oaks, two black oaks, and two sour-woods; thence south forty-five degrees east twelve hundred and fifty poles to the beginning. To have and to hold the said tracts or parcels of land with their and every of their appurtenances (excepting the land formerly conveyed by the said Chas. Fleming to John & William Bryan) to the said John Bryan & his heirs forever to the only proper use and behoof of him, the said John Bryan and his heirs forever: and the said Wm. Fleming, John Bernard, and Richard Bernard for themselves and their respective heirs covenant and agree to and with the said John Bryan and his heirs forever that they and their heirs shall and will warrant and forever defend the said three tracts or parcels of land after excluding the part formerly conveyed to John & Wm. Bryan to the said
222 John Bryan and his heirs forever from the claim and demand of them, the said Wm. Fleming, John Bernard, and Richard Bernard, and their respective heirs, and all persons claiming from under them, or either of them, and all other person or persons whatever claiming right from under the said Chas. Fleming, but not from the claim or demand of any other person or persons whatever.

In testimony whereof, the said Wm. Fleming, John Bernard, and Richard Bernard and Chas. Marshall, by William Marshall, his att'y-in-fact, have hereunto affixed their respective hands and seals, the day, month, and year first written.

WM. FLEMING. [SEAL.]
JOHN BERNARD. [SEAL.]
W. F. & RICH'D BERNARD. [SEAL.]
W. M. CHAS. MARSHALL, [SEAL.]
By WM. MARSHALL,
His Attorney-in-fact.

Signed, sealed, & delivered in the presence of—
RICH'D BROMLEY.
THOS. WM. LAUSEN.
JACOB VALENTINE.

VIRGINIA, *City of Richmond, sct:*

Be it known to all whom it may concern, that on this second day of January, one thousand seven hundred and ninety-seven, came personally before me, Robert Mitchell, mayor of the said city, Wm. Fleming, John Bernard, Richard Bernard, and William Mar-
223 shall, attorney-in-fact for Charles Marshall, and acknowledged the annexed indenture of bargain and sale made to John Bryan to be their acts and deeds, hands and seals.

In testimony whereof, I have hereunto put my hand and affixed my seal of office, the day and year last aforesaid.

[L. S.] ROB'T MITCHELL, *Mayor.*

STATE OF KENTUCKY, *sct:*

I, Archilles Sneed, clerk of the court of appeals for the State aforesaid, being duly authorized by law to receive, admit, and record deeds and other writings in my office, do certify that the foregoing deed and power of attorney, together with the certificates thereto annexed, was produced to me in my office aforesaid, on the eighth day of June, one thousand eight hundred and sixteen, and the same is duly admitted to record.

In testimony whereof, I have hereunto set my name this 18th day of June, 1817.

ARCHILLES SNEED, *C. C. A.*

The above is endorsed on the back as follows:

224 Wm. Fleming, John Bernard, Richard Bernard, & Charles Marshall to John Bryan.

Deed for 54,191.
13,333
40,858.

35,456, 5,406 acres of land, Mason county, Kentucky. Received June 8th, 1816. Recorded in liber Q., page 499, No. 3. Examined. Tax, 56 cts.; fee, $266.00.

Notice to Jane G. Shore & Others. July 1st, 1816.

To Jane Grayson Shore, Elizabeth Smith Shore, and Mary Louisa Shore, heirs and representatives of Thos. Shore, dec'd:

Take notice, that on the 26th, 27th, and 28th days of August next, at the office of Henry and Edmund Wilkes, attorneys-at-law, in the city of New York, between the hours of ten in the morning and five in the afternoon, I shall take the deposition- of Sam'l Corp, Rob't Lennox, John Taylor, John Ramsey, Robert Bach, Peter Jay Monroe, John Toutt, Beverly Robinson, Sam'l J. Beebee, John Wilkes,

and John Goodwin, all of the said city of New York or its vicinity, to be read in evidence in a suit in chancery, depending and undetermined, in the Greenup circuit court, wherein I am compl't and Geo. Johnson and you are defendants.

Frankfort, Ky., July 1st, 1816.

JAMES HUGHES. 28–4 w.

I, Fielding Bradford, Jr., editor of the Kentucky Gazette,
225 do certify that the annexed notice of James Hughes to Shore's heirs has been published for four weeks in succession in said Gazette, commencing the 8th day of July, 1816.

Given under my hand this 28th day of October, 1816.

F. BRADFORD, Jr.

Personally appeared before me, one of the Commonwealth's justices of the peace for the county of Fayette, F. Bradford, Jr., and made oath that the above certificate contains the truth.

Given under my hand this 2d day of November, 1816.

O. KEENE.

Endorsed on the back as follows: Hughes *vs.* Shore's heirs. Notice. Filed 15th Sept., 1817.

Notice. July 12th, 1816.

To Jane Grayson Shore, Elizabeth Smith Shore, and Mary Louisa Shore, heirs and representatives of Thos. Shore, deceased, and George Johnson:

Take notice that on the 26th, 27th, & 28th days of August next, at the office of Henry and Edmund Wilkes, attorneys-at-law, in the city of New York, between the hours of ten in the morning
226 and five in the afternoon, I shall take the depos. of Sam'l Corp, Rob't Lennox, John Taylor, John Ramsey, Rob't Bach, Peter Jay Monroe, John Torot, Beverly Johnson, Samuel J. Beebee, John Wilkes, and John Goodwin, all of the said city of New York, or its vicinity, to be read in evidence in a suit in chancery depending and undetermined in the Greenup circuit court, wherein I am compl't and you, George Johnson, Jane Grayson Shore, Elizabeth Smith Shore, and Mary Louisa Shore are defendants.

Frankfort, Ky., July 12th, 1816.

JAMES HUGHES.

Endorsed on the back as follows: Hughes *vs.* Johnson & Shore's heirs. Notice.

KENTUCKY, } *sct:*
Montgomery Co., }

Personally appeared before me, a justice of the peace for the said county, Cuthbert Banks, who, being duly sworn, made oath: That

on the 12th day of this present July he served a copy of the within notice on the within-named Geo. Johnson.

Given under my hand this 12th day of July, 1816.

JOHN LYLE.

227 *Depositions, Power of Attorney, and Deed. August 4th*, 1816.

In pursuance of a *dedimus* directed to us, two of the assistant justices in the city of New York, having the power of taking affidavits and exercising certain other duties of justices of the peace, from the Greenup circuit court, in the Commonwealth of Kentucky, to take depositions of sundry witnesses, to be read in evidence in the suit in chancery depending and undetermined in the said circuit court, wherein James Hughes is complainant and Geo. Johnston and Shore's heirs are defendants, we have caused to come before us John Wilkes, of the city of New York, notary public, at the office of Henry & Edmund Wilkes, attorneys-at-law, this twenty-eighth day of August, one thousand eight hundred and sixteen, between the hours of ten in the morning and five in the afternoon, who, being of full age and first duly sworn, deposes and says:

That the annexed writing, marked "C," is a just and true copy of an original instrument in writing purporting to be a deed of trust made by John Goodwin, John Ramsey, and George Douglass, Jr., to Nathaniel Lawrence, bearing date the twenty-eighth day of
228 May, one thousand seven hundred and ninety-nine, the same having been carefully examined by him, this deponent, with the said original deed of trust, now in his possession. And he further deposes and says: That the said original deed of trust has been left in his possession by Mr. Samuel Corp, subject, nevertheless, to the order of the said Sam'l Corp. And further he, this deponent, saith not.

JOHN WILKES.

Sworn to before us, the day and year first before mentioned.

PH. TABELE,
Ass't Justice.

ELISHA MORRILL,
Ass't Justice.

This indenture, made the twenty-eighth day of May, in the year of our Lord one thousand seven hundred and ninety-nine, between John Goodwin, John Ramsey, and George Douglass, Jun'r, of the city and State of New York, merchants, of the first part, and Nathaniel Lawrence, of the city and State aforesaid, merchant, of the second part:

Whereas by a certain indenture, bearing date the thirtieth day of July, in the year of our Lord one thousand seven hundred and ninety-eight, made between Sam'l Sackett, of the city of New York, merchant, of the one part, and the said John Goodwin, John Ramsey, and George Douglass, Junior, of the other part, he, the
229 said Sam'l Sackett, for certain considerations therein expressed and set forth, did grant, bargain, sell, alien, convey, confirm,

assign, and set over unto the said John Goodwin, John Ramsey, and George Douglass, Junior, and the survivors and survivor of them, and to their heirs, executors, administrators, and assigns forever, all those certain tracts, pieces, or parcels of land and premises hereinafter described, to wit: All that certain tract, piece, or parcel of land, situate, lying, and being in the county of Tioga and State of New York, in the township of Sidney, containing three thousand five hundred and fourteen acres, being, viz: Lot number one, in the fourth tract, containing six hundred and forty acres; the easternmost one-half of lot number two, adjoining lot number one, containing three hundred and twenty acres; lot number eight on the first tract, containing five hundred and twenty-five acres; lots number three, six, and seven, on the said fourth tract, number three containing six hundred and forty acres, number six six hundred and ninety-nine acres, and number seven six hundred and ninety acres. Also all that certain tract, piece, or parcel of land situate, lying, and being in the said county of Tioga and State of New York, being part of the southeast quarter of township number seven, in Watkins and Flint's
230 purchase, containing seven thousand two hundred acres. Also all those several tracts, pieces, or parcels of land situate, lying, and being in the county of Onondaga and State of New York, being lots number forty-six in Marcellus, number ninety in Hector, thirty-five [in] Locke, sixty-one in Pompey, seventy-five in Hector, ninety-nine in Aurelius, seven in Cicero, eighty-five in Romulus, twenty in Junius, eight in Cicero, and thirteen in Solon. Also all of those certain tracts, pieces, or parcels of land situate, lying, and being in the county of Ulster and State of New York, being about five thousand six hundred and seventy-five acres, and described in a certain deed, bearing date the fourteenth day of December, in the year of our Lord one thousand seven hundred and ninety-six, from Augustus Sackett to the said Sam'l Sackett. Also all that certain tract, piece, or parcel of land situate, lying, and being in the township of Charlotte and county of Clinton, in the State of Vermont, containing one hundred and forty acres. Also all that certain tract, piece, or parcel of land situate, lying, and being in the county of Randolph and State of Virginia, containing fifty thousand
231 acres. Also all those certain tracts, pieces, or parcels of land situate, lying, and being in the county of Montgomery and State of Georgia, on the waters of the Cannouchee river, containing fifty-six thousand acres. Also all those certain tracts, pieces, or parcels of land situate, lying, and being in the said county of Montgomery and State of Georgia, on the waters of the Altamaha river, containing forty-five thousand acres. Also all those certain tracts, pieces, or parcels of land situate, lying, and being in McIntosh county, in the said State of Georgia, on the said waters of the Altamaha river, containing thirty-five thousand acres. Also all those certain tracts, pieces, or parcels of land situate, lying, and being in Camden county, in the said State of Georgia, on the waters of the Great Sitilla river, containing thirty thousand acres. Also all those certain tracts, pieces, or parcels of land situate, lying, and being in

the said county of Montgomery, in the said State of Georgia, on the waters of the Ohoopee river, containing eighty thousand acres. Also all that certain tract, piece, or parcel of land situate, lying, and being in Mason county, in the State of Kentucky, on the waters of the Ohio river, containing sixteen thousand one hundred and ninety acres. Also
all that certain other tract, piece, or parcel of land situate, lying,
232 and being in Mason county, in the State of Kentucky aforesaid, on the waters of the said river Ohio, containing nine thousand five hundred and ninety-nine acres. Also all that certain tract, piece, or parcel of land situate, lying, and being on the banks of the Ohio river, in the county of Fayette, and State of Kentucky, containing twelve thousand seven hunered and thirty-four acres. Also all that certain tract, piece, or parcel of land situate, lying, and being in Campbell county, in the said State of Kentucky, being the one —— fifteen thousand acres, and containing seven thousand five hundred acres. Also all that certain tract, piece, or parcel of land situate, lying, and being in Bourbon county, in the said State of Kentucky, on the banks of —— fork, containing three thousand acres. Also all that certain tract, piece, or parcel of land situate, lying, and being in Jefferson county, in the said State of Kentucky, containing two thousand two hundred and eighty-two acres. Also all that certain other tract, piece, or parcel of land situate, lying, and being in the said county of Jefferson, and State of Kentucky, containing one thousand five hundred and twenty-five acres. Also
all the right and title of the said Sam'l Sackett to all lands
233 and real property in the said State of New York, or elsewhere, inherited by him in right of his father, Sam'l Sackett, dec., and also all the real estate which the said Sam'l Sackett is possessed of, or entitled to, in the said State of New York or elsewhere, together with all and singular the rights, members, and appurtenances thereof, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, claim, and demand, both in law and equity, of him, the said Sam'l Sackett, of, in, or to the same, and of, in, and to every part and parcel thereof, and also all the personal property, debts, claims, and demands then due, owing, or belonging to the said Sam'l Sackett, in law or in equity, of whatever nature or kind the same might be. To have and to hold all the said estate, real and personal, unto the said John Goodwin, John Ramsay, and George Douglass, Jun'r, and the survivors and survivor of them, and to their heirs, executors, administrators, and assigns, forever, subject, nevertheless, to the trusts therein mentioned, to wit: In trust for all the creditors of the said Sam'l Sackett, who,
—— at or before the expiration of six calendar months, from the date of the —— indenture, execute to the said Samuel
234 Sackett an absolute and effectual — and discharge of their demands, respectively, against him, the said Sam'l Sackett, provided none of the creditors of the said Sam'l Sackett should receive more than should amount to his or their demands, with interest for the same. And further, in trust to pay all charges, costs, and expenses which the said Samuel Sackett had then incurred or

should thereafter incur in defending the suits commenced or that might thereafter be commenced against him by his creditors, or that might accrue upon the execution of the trust and designs specified in the said indenture; and in further trust to sell and dispose of the said property and collect and receive the said debts and, after paying the said costs and expenses, to divide and pay among the said creditors the net proceeds thereof as far as the amount of the said debts and the interest thereof, and in case the same should not amount to the sum due by the said Sam'l Sackett to the said creditors so discharging him, then *pro rata*, according to the amount of their respective demands, and if the same should exceed the amount of the demands of such creditors, then in trust to pay the remainder thereof to such creditors as the said Sam'l Sackett should
235 nominate and appoint, and in case a majority of the said creditors so discharging the said Sam'l Sackett should agree to appoint other trustees, then in trust to assign over and convey the same property to such other trustees, subject to the terms and conditions thereinbefore mentioned, as by the said indenture, to which the parties to these presents refer, may more fully and at large appear: And whereas many of the creditors of the said Sam'l Sackett did execute to him an absolute and effectual release and discharge of their demands, respectively, against him within the period so limited as aforesaid; and whereas a majority of those creditors of the said Sam'l Sackett, who had so released and discharged him as aforesaid, have also, in and by a certain instrument in writing, bearing date the twenty-seventh day of February, one thousand seven hundred and ninety-nine, nominated and appointed Sam'l Corp and Isaac Titford, of the city of New York, merchants, to be trustees as aforesaid, with the said Geo. Douglass, Junior, in the room and stead of the said John Goodwin and John Ramsey: Now this indenture witnesseth, that the said parties of the first part, for and in consideration of the premises and of the sum of one dollar, lawful money of the United States of America, to them in
236 hand paid, before the execution of these presents, by the said party of the second part, the receipt whereof is hereby acknowledged, and in order that the lands, tenements, and hereditaments aforesaid, and also all the personal estate, property, debts, claims, and demands above mentioned, and which were conveyed and assigned, as aforesaid, by the said Samuel Sackett to the said parties of the first part, may be legally conveyed and transferred to and become vested in the said Sam'l Corp, Geo. Douglass, Junior, and Isaac Titford, as joint tenants, according to the true intent and meaning of the said indenture made between the said Sam'l Sackett and the said parties of the first part in manner aforesaid, have, and each of them hath, granted, bargained, aliened, sold, conveyed, confirmed, assigned, and set over, and by these presents do, and each of them doth, grant, bargain, alien, sell, convey, confirm, assign, and set over, unto the said party of the second part, and to his heirs, executors, administrators, and assigns, all those certain tracts, pieces, or parcels of land and premises hereinbefore described and set forth as having been conveyed to the said parties of the first part by the said

Sam'l Sackett, and also, all the personal estate, property, debts,
237 claims and demands above mentioned, to have been conveyed in like manner as aforesaid; to have and to hold all and singular the said tracts, pieces, or parcels of land and premises, and also all the personal property, debts, claims, and demands aforesaid, unto the party of the second part, and to his heirs, executors, administrators, and assigns, upon this special trust and confidence, nevertheless, that he, the said party of the second part, shall and do, immediately after the execution of these presents, well and sufficiently, grant, sell, bargain, alien, convey, confirm, assign, and set over unto the said Sam'l Corp, Geo. Douglass, Junior, and Isaac Titford, all and singular the said tracts, pieces, or parcels of land and premises, and also all the personal property, debts, claims, and demands, which is hereby conveyed, in trust for all the creditors of the said Sam'l Sackett, who have executed his discharge as aforesaid, provided, none of the creditors of the said Sam'l Sackett shall receive more than the amount of his or their demands, with interest for the same; and further, in trust, to pay all costs, charges, and expenses which the said Sam'l Sackett hath already incurred, or hereafter shall incur, in defending the suits commenced, or that
may be hereafter commenced, against him by his creditors, or
238 that have or may accrue upon the execution of the trusts and designs specified in these presents; and in further trust, to sell, and dispose of the said property, collect and receive the said debts, and after paying the said costs and expenses, to divide and pay among the said creditors the net proceeds thereof, as far as the amount of the said debts and the interestt hereon, in case the same shall not amount to the sum due by the said Sam'l Sackett to thesa id creditors so discharging him, then *pro rata* according to the amount of their respective demands, and if the same shall exceed the amount of the demands of such creditors, then in trust to pay the remainder thereof to the creditors, as the said Sam'l Sackett shall nominate and appoint.

In witness whereof, the parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

JOHN GOODWIN. [SEAL.]
JOHN RAMSEY. [SEAL.]
GEO. DOUGLASS, JR. [SEAL.]

Sealed and delivered in the presence of—the word "ninety" between the thirty-first and thirty-second lines, and the words "by the said party of the second part," between the thirty-third
239 and thirty-fourth lines being first inserted—
ROBT McMILLAN.
SAM' BREWER.

STATE OF NEW YORK, } *ss.:*
U. S. of America, }

I, John Wilkes, notary public, duly admitted and sworn, dwelling in the city of New York, and having power, by commission, under the great seal of the said State to attest deeds, wills, and all other

instruments in writing, do hereby certify and declare that the five preceding pages contain a just, true, and perfect copy of an original writing this day handed to me, in order to have a notarial copy made thereof, (the same purporting to be a deed of trust between John Goodwin, John Ramsey, and George Douglass, Junior, of the city of New York, merchants, of the first part, and Nathaniel Lawrence, of said city, merchant, of the second part, dated the twenty-eighth day of May, in the year one thousand seven hundred and ninety-nine).

I, the said notary, having carefully compared and examined the said copy with the said original deed, and found the same to
240 agree therewith, word for word, and I now make this public act thereof, that the same may serve and be of full force and value, as of right it shall appertain.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office, the twenty-fourth day of August, in the year of our Lord one thousand eight hundred and sixteen.

JOHN WILKES,
Not. Pub.

Which said deposition, &c., is endorsed on the back as follows: James Hughes *vs.* Shore's heirs & Johnson. Depositions, power of att'y, and deed.

Notice for Survey. March 17th, 1817.

SIR: Take notice that on the first day of April next, at the hour of twelve, the surveyor of Greenup county will meet at Squire King's, near the mouth of Tygart's creek, in the said county, and from thence, if it is a fair day, proceed to execute the order of survey in the chancery suit depending and undetermined in the Greenup circuit court, wherein I am complainant and you and Shore's heirs, &c., are defendants; and if the said first day of April is not a fair day the surveyor will attend at the same hour on the next fair day.
241 J. HUGHES.

To Capt. GEO. JOHNSON.
March 17th, 1817.

Endorsed on the back as follows: Hughes to Johnson. Copy notice for survey. W. Shortridge will observe the notice was not given in legal time. G. Johnson.

Power of Attorney. April 21st, 1817.

Know all men by these presents, that I, Sam'l Beebee, of the city and State of New York, do by these presents constitute and appoint Peter Mills, of Charleston, Brook county, State of Virginia, as my true and lawful attorney, for me and in my behalf to ascertain the value of and also to make sale of thirty-four thousand one hundred and ninety-one acres of land, lying in Mason county, State of Kentucky, as specified in two certain patents or grants thereof, made by the State af Virginia to Charles Fleming and by him or his execu-

tors conveyed to John Bryan, and by said Bryan conveyed to Sam'l Sackett, of the city of New York, merchant, and by said Sackett, conveyed to his trustees for the benefit of his creditors, and by the
242 said trustees conveyed to the said Sam'l Beebee, as will appear by said deed, executed by Samuel Corp for himself and Isaac Titford, by his attorney, Sam'l Corp, acting trustee; and the said Beebee authorizes his attorney, said Peter Mills, on the sale of said land, to execute a similar and like conveyance to the purchaser as the one he has executed from the said trustee, hereby ratifying and confirming whatsoever my said attorney shall do in the premises.

Done in New York, this twenty-first day of September, one thousand eight hundred and seven.

SAM'L BEEBEE. [SEAL.]

Signed, sealed, and delivered in presence of—
R. W. ROBINSON.
BEN. LEDYARD.
THOS. COOPER.

CITY AND STATE OF NEW YORK, *ss:*

On the 21st September, 1807, before me came Samuel Beebee, known to me to be the person described by that name in the within power of attorney, who did acknowledge that he had executed the same. I allow it to be recorded.

THOMAS COOPER,
Master in Chancery.

There is no deed to be executed by virtue of this power
243 until said Mills writes to said Beebee and receives further advicee by letter of instruction from said Beebee.

SAM'L BEEBEE. [SEAL.]

Witness: FEN. LEDYARD.

CITY AND STATE OF NEW YORK, *ss:*

Personally appeared before me, Benjamin Ledyard, a public notary in and for the said State, duly commissioned and sworn, residing in the said city of New York, Sam'l Beebee, who acknowledged that he signed, sealed, and delivered the within power of attorney, and also the annexing clause, for the reasons and purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, this twenty-second day of September, eighteen hundred and seven.

[SEAL.] BENJ. LEDYARD, *Not. Pub.*

CITY AND COUNTY OF NEW YORK, *ss:*

I, John L. Broome, clerk of the city and county of New York and clerk of the court of common pleas, called the mayor's court, of the said city, do hereby certify that Benjamin Ledyard, who has

given the above certificate, was at the time of executing the
244 same a public notary in and for the State of New York, duly commissioned and sworn, and residing in the city of New York, and that the name affixed to the said certificate is his signature.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, this twenty-eighth day of March, in the year of our Lord one thousand eight hundred and sixteen.

[SEAL.] JOHN L. BROOME.

CITY OF NEW YORK, *ss:*

By Jacob Radcliff, mayor of the city of New York, it is hereby certified that John L. Broome whose name is subscribed and seal of office affixed to the within certificate, is the clerk of the court of common pleas of said city and county, commonly called the mayor's court, and that full faith and credit are due to his official acts and deeds.

In testimony whereof, I have hereunto subscribed my name and have caused the seal of mayoralty of said city to be affixed, this 28th day of March, A. D. 1816.

[SEAL.] JACOB RADCLIFF.

STATE OF KENTUCKY, *sct:*

245 I, Achilles Sneed, clerk of the court of appeals for the State aforesaid, being duly authorized by law to receive and admit to record deeds and other writings in my office, do hereby certify that the foregoing power of attorney was produced to me in my office, in Frankfort, on the 21st day of April, 1817, and that the same, together with the several endorsements thereon, are duly admitted to record.

In testimony whereof, I have hereunto set my name, this 23d day of April, 1817.

ARCHILLES SNEED, *C. C. A.*

Endorsed on the back as follows: Sam'l Beebee to Peter Mills. Filed April 21st, 1817.

The Separate Answer of George Johnson to a Bill in Chancery exhibited against him by James Hughes in the Greenup Circuit Court. Filed April 21st, 1817.

This respondent, saving and reserving all manner of exceptions to the many errors and untruths contained in said bill, for answer to as much thereof as he is advised it is necessary to answer, saith:

That it is true that Chas. Fleming entered 26,373 acres of
246 land as in the bill stated, but denies that the same was properly surveyed agreeably to location, and if properly surveyed, this respondent is informed and the court has acknowledged, as he is further informed, will not cover or include any part of the land this respondent claims, or is in possession of.

He also desires that the entry of said Fleming is special and notorious, as is in said bill of complaint stated.

This respondent does not deny but that a patent issued bearing

date, &c., to Charles Fleming, as in the bill stated. But as there are things not within the positive knowledge of this respondent, he requires full proof of the same.

This respondent knows nothing of the conveyances and derivations of title which the complainant has derived from the said Charles Fleming, as stated in his bill, and requires full proof of the correctness and legality of the same, but charges that he is in-
247 formed that either one of the feoffers or feoffees was an alien at the time of the conveyance. This matter the said respondent at present knowing only from information, he at some future period prays the court to be admitted more fully to answer and charge.

This respondent admits that John Marshall made the entry as stated in the bill, and surveyed it, &c., as the bill charges, and that the assignment was made to Shore and McConnico as stated; but as to the assignment between Marshall's executors and compl't, this respondent knows nothing, therefore requires proof. This respondent admits he purchased the interest and all the claim of said McConnico to said land, and is advised to say, and charges, that the said Shore and McConnico, being joint tenants in said land, and the said Shore denying before the said McConnico that the whole interest of Shore survived to the said McConnico, and from the interest purchased in said land by this respondent from McConnico, he is entitled to all the interest the said Shore originally had, as well as that of the said McConnico.

This respondent, in answer to the special interrogatories of the said compl't as to what other claim he holds under — to said land, charges that on the — day of ——, Richard Ridgely made three entries with the proper surveyor, one on Treasury warrants
248 Nos. —, in all making the quantity of 16,000 acres, and which entries are in the following words:

Richard Ridgely enters, &c., but for greater certainty copies of said entries are herewith filed and made a part of this answer, and which entries are special and notorious, and that on the — day of —— caused the same to be surveyed agreeably to law, and on the — day of —— assigned the platts and certificates of said surveys, by his agent, to this respondent, to whom on the — day of —— a patent issued, as assignee of said Ridgely, and which title derived as aforesaid the said respondent charges to be better and superior to those under which the complainant claim—

This respondent denies all fraud, combination, &c.; and, having fully answered, prays hence to be dismissed with his costs, &c.

G. JOHNSON, *P. D.*

MONTGOMERY COUNTY, *ss*:

This day George Johnson made oath before me, a justice of the peace for the county aforesaid, that the within answer is true so far as he states from his own knowledge, and so far as he states from the information of others he believes to be true.

Given under my hand, this 18th April, 1817.

JOHN LYLE.

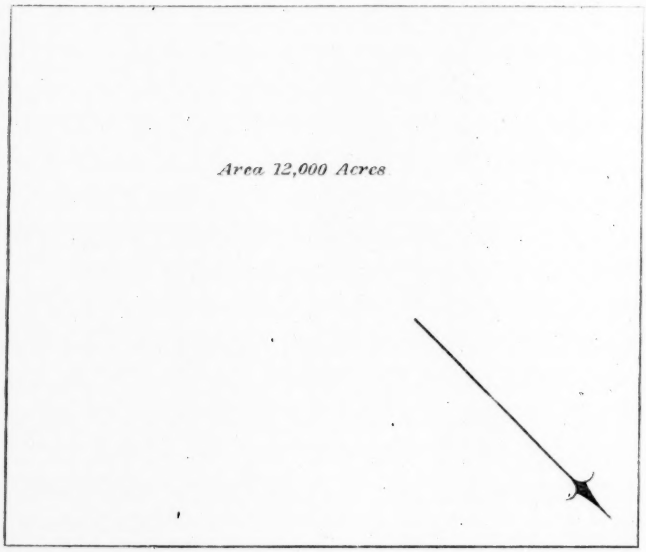
249 Endorsed on the back as follows: Johnsons ads. Hughes. Answer. 1817, April 28th filed.

250 *Copy Survey, Wm Fitzhugh. May* 14, 1817.

FAYETTE COUNTY, *Jan'y* 10, 1786.

Surveyed for Wm. Fitzhugh, 12,000 acres of land, by virtue of 6 Treasury warrants, Nos. 15273, 15320, 15256, 15322, 15321, 15253.

Variation, 3° 50° east.



Scale, 400 poles p'r inch.

Entered Oct. 30th, 1783, lying on the waters of the Ohio, adjoining a survey of 8,406⅔ acres made for Richard Graham. Beginning at the E. corner of said survey at ten white oaks, running thence S. 45 W. 1,280 poles to a stake in said Graham's line; thence S. 45 E. 1,500 poles to two dogwoods, two sour-woods, two maples, & two red oaks standing on the east side of a hill; thence N. 45 E. 1,280 poles crossing several runs & branches to six white oaks & four hickories on the northwest side of a branch; thence N. 45 W. 1,500 poles crossing several runs & branches to the beginning.

JOHN WALLER,
D. S. F. C.

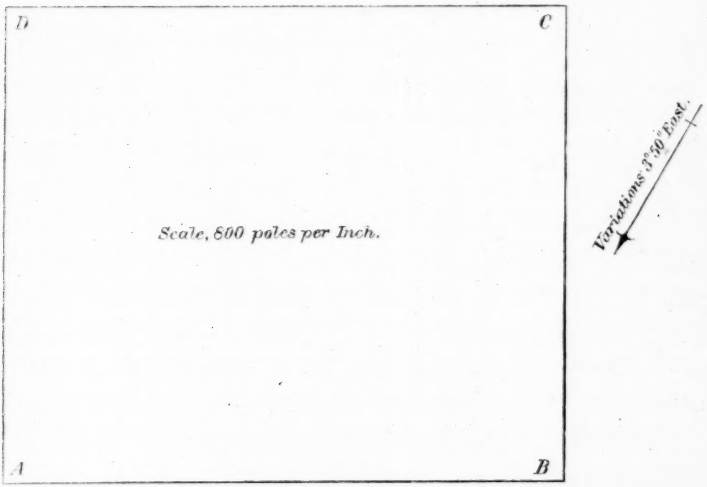
BYRAM ROUTT,
ANTHONY KENDALL,
C. C.
WILLIAM ROUTT, *Marker.*

THOS. MARSHALL, *S. F. C.*

A copy. Test: JOHN M. FOSTER,
R. L. Off.

251 Endorsed on the back as follows: William Fitzhugh. 1,200 acres. Copy survey. Fee 25 cts. Grant issued 14th May, 1787. Examined.

252 *Copy Survey, R Graham. July 21st*, 1817.



FAYETTE COUNTY, *March 8th*, 1785.

Surveyed for Richard Graham eighty thousand four hundred & six & a fourth acres of land by virtue of an entry, Oct. 30th, 1783, on a Treasury warrant No. 19207, on the waters of the Ohio river, beginning at the head of the right-hand fork of Tygart's creek, two hickories, two maples, two white oaks, two poplars, two dogwoods, & two sour-woods; thence S. 45 W. 3,840 poles crossing several creeks to two chestnut trees, two dogwoods, two sour-woods, two chestnut oaks, two hickories, & twelve red oaks standing on the point of a ridge; thence S. 45 E. 3,350 poles crossing several runs to one mulberry tree, two ashes, one sycamore, marked thus (R. G.), six buckeyes, & twelve sugar trees standing on the bank of a
253 large creek & near the mouth of a run; thence S. 45 E. 3,840 poles crossing several runs & creeks to ten white oaks; thence N. 45 W. 3,450 poles crossing several creeks to the beginning.

SIMON MORGAN,
D. S. F. M.

JOHN KURNS,
WILLIAM ROGERS,
C. C.
SAMUEL NANHOOK, *Marker.*
Ex'd.
A copy. Test: T. MARSHALL, *S. F. C.*
JOHN M. FOSTER,
R. L. Off.

Endorsed on the back as follows: Richard Graham. 80,406¼ acres. Copy survey. Fee 25 cts. Grant issued 1st May, 1782. Examined. Hughes *vs.* Shore's & Johnson. Filed by compl't July 21st, 1817.

254 *Copies Entries Graham's 80,406½ Acres, July 30th,* 1817.

October 30th, 1783. Richard Graham, 80,406½ T. W. No. 19207, lying on the waters of the Ohio, begins at the head of the right-hand fork of Tygart's creek, that empties into said creek about 4 miles from the mouth thereof, and running thence S. 45 W. m. s.; thence S. 45 east from the ends of this line of 12 miles for quantity.

Copy. Test: JOHN YOUNG, *S. G. C.*

Feb'y 2d, 1785. Charles Fleming enters 18,000 acres, No. 20345, on the waters of Ohio, beginning at the E. corner of William Fitz. hugh's 12,000 acre entry, then S. 45 W with his line 4 miles; then at right angles so far that a line parallel to the first shall include the quantity.

Copy. Test: JOHN YOUNG, *S. G. C.*

Oct. 30th, 1783. Wm. Fitzhugh, 12,000 T. Wrts. No. 15273, 15320, 15356, 15322, 15321, 15253, lying on the waters of Ohio, adjoining an entry of 80,406½ made in the name of Richard Graham, begins at the E. corner of said entry and runs thence S. 45
255 W. with a line of said entry 4 miles; then at right angles from each end of this line of 4 miles S. 45 E. for quantity.

Copy. Test: JOHN YOUNG, *S. G. C.*

Oct. 30th, 1783. Alexander Brown, 16,000, T. W. No. 18898, 18896, lying on the waters of the Ohio, beginning in the line of an entry made in the name of Rich'd Graham, for 80,406½ acres, at the corner of an entry made for Wm. Fitzhugh of 12,000 acres, and running then with the line of said Graham's entry to the corner thereof; then out at right angles for quantity.

Copy. Test: JOHN YOUNG, *S. G. C.*

Oct. 31st, 1783. Evan Griffith, 2,051¾, T. W. No. 19180, lying on the waters of Ohio, beginning at the E. corner of Alex'r Brown's entry of 16,000 acres, and running S. 45 W. 400 poles; then at right angles eastward for quantity.

Copy. Test: JOHN YOUNG, *S. G. C.*

Oct. 31st, 1783. Garland Callis, 4,900 acres, T. W. No. 15232, 15278, lying on the waters of the Ohio, beginning in the line of Alex'r Brown's entry of 16,000 acres at the corner of Evan Griffith's entry of 2,051¾, extending with a line of said entry southwardly 800 poles; then out at right angles for quantity.

256 Copy. Test: JOHN YOUNG, *S. G. C.*

Oct. 31st, 1783. Joseph Fishback and Wm. Berry 2,205, T. W. No. 19134, beginning in the line of Alex'r Brown's entry of 16,000

acres, and a corner of Garland Callis' entry of 4,000 acres, and running thence with the first-mentioned entry westward to the corner, then out at right angles for quantity.

Copy. Test: JOHN YOUNG, *S. G. C.*

Oct. 31st, 1783. Wm. Payne, 1,606, T. W. No. 14544, beginning at the most southerly corner of Fishback's entry of 2,205 acres, and extending with the line N. 45 E. 400 poles, then at right angles S. E. for quantity.

Copy. Test: JOHN YOUNG, *S. G. C.*

Oct. 31st, 1783. Chas. Craddox, 4,537, T. W. No. 19579, beginning at the corner of Wm. Payne's entry in the line of Jos. Fishback's entry of 2,205, and extending with Fishback's entry N. E. to the *the* and then out at right angles from each end of this line for quantity.

Copy. Test: JOHN YOUNG, *S. G. C.*

257 Oct. 31st, 1783. George Graham, 4,857, T. W. No. 17558, beginning at the corner of John Moss' entry in the line of Alex'r Brown's of 16,000 acres, and with the line of said Brown's entry to the corner, then out at right angles and binding on the entry of said Moss for quantity.

Copy. Test: JOHN YOUNG, *S. G. C.*

Oct. 31st, 1783. John Moss, 3,063, T. W. 14549, beginning at Chas. Craddock's E. corner and running from thence N. W. to the line of Alex. Brown's, then with Brown's line N. E., and from the beginning the same course for quantity.

Copy. Test: JOHN YOUNG, *S. G. C.*

Endorsed on the back as follows: James Hughes *vs.* Shore's heirs and Johnson. Filed by compl't, July 30th, 1817. Copies 14 entries Graham's 80,406½ connection. Fee $2.38.

Amended Bill Filed Aug. 1st, 1817.

An amendment to the bill of complaint filed by James Hughes, complainant, in the Greenup circuit court, against Shore's heirs and George Johnston, defendants.

258 Your orator shews that since the filing his original bill he has been informed that Rob't H. Grayson, who he prays may be made a defendant to this bill, has obtained from Christopher McConnico a conveyance of part of the 8,000 acres of land in the bill mentioned, Your orator prays that he may be compelled to answer and convey, &c.

J. HUGHES, *P. P.*

Endorsed on the back as follows: Hughes *vs.* Shore's Heirs and Johnson. Amended bill. 1817, August 1st, filed.

Co. Deed. Sackett and wife to Conkling, &c. August 1st, 1817.

This indenture made this twenty-ninth day of August, in the year one thousand seven hundred and ninety-five, between Samuel Sackett, of the city of New York, and Elizabeth, his wife, of the first part, and Joseph Conkling, Jr., and Samuel P. Lloyd, of the same city, of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of three thousand seven hundred and seventy-seven pounds seventeen shillings and four pence, current money of the State of New York, to them
259 in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, enfeoffed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, enfeoff, and confirm unto the said parties of the second part, in the actual possession, now being by virtue of a bargain and sale to them thereof made by indenture, bearing date the day before the day of the date of these presents, and also by virtue of the statute for transferring of uses into possession, and to their heirs and assigns, forever, all those two certain tracts, pieces, or parcels of land situate, lying, and being in the late Commonwealth of Virginia, now State of Kentucky, in the late county of Mason, and on the waters of the Ohio, the one tract containing twenty thousand acres, being patented to Chas. Fleming by the said Commonwealth of Virginia, and bounded as follows, to wit: Beginning at the south corner of an entry in the name of General James Wilkinson & Company of thirty-seven thousand two hundred and fifty-six acres, at five white oaks and three black oaks, thence south forty-five degrees west two thousand five hundred and sixty poles, crossing several waters, to three black oaks and sour-wood; thence N. forty-five degrees west, one thousand
260 two hundred and fifty poles, crossing several waters, to six white oaks; thence N. forty-five degrees east two thousand five hundred and sixty poles, crossing several waters, to two white oaks, two black oaks, and two sour-woods; thence S. forty-five degrees E. one thousand two hundred and fifty poles, crossing several waters, to the beginning. The second of the said tracts containing eight thousand three hundred and thirty-four acres, and being part of a tract of eighteen thousand acres, which is patented to the said Chas. Fleming, and bounded as follows, to wit: Beginning at the east corner of William Fitzhugh's twelve thousand acre entry, at four hickories and six white oaks, standing in a bottom, thence S. forty-five degrees west one thousand two hundred and eighty poles, crossing branches, to two red oaks, two dogwoods, and a maple; thence S. forty-five degrees east two thousand two hundred and fifty poles, crossing branches to five white oaks; thence N. forty-five degrees east one thousand two hundred and eighty poles, crossing branches, to a stake; thence N. forty-five degrees W. two thousand two hundred and fifty poles, crossing branches, to the beginning; which said eight thousand three hundred and thirty-four
261 acres are bounded as follows, to wit: Beginning at the most southerly corner of the said last-mentioned tract of land at the said five white oaks, thence N. forty-five degrees E. one thou-

sand two hundred and eighty poles to a stake; thence N. forty-five degrees W. from the said two last mentioned bounds, so far as to include the said eight thousand three hundred and thirty-four acres, and containing, with the said first-mentioned tract, twenty-eight thousand three hundred and thirty-four acres, together with all and singular the profits, privileges, advantages, emoluments, rights, members, hereditaments, and appurtenances whatsoever to the said twenty-eight thousand three hundred and thirty-four acres belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders thereof, and also all the estate, right, title, interest, property, possession, claim, and demand of the said parties of the first part, of, in, and to the same, and of, in, and to every part and parcel thereof; to have and to hold the said tracts of land to the said parties of the second part, their heirs and assigns, to the only proper use, benefit, and behoof of the said parties of the second part, their heirs and assigns, forever, as tenant in common; and the said parties of the first part, for
262 themselves, their heirs, executors, and administrators, do covenant and grant to and with the said parties of the second part, their heirs and assigns, that at and immediately before the ensealing and delivery of these presents they are seized in their own right in fee-simple of a good estate of inheritance, and have in themselves good right, full power, and lawful authority to sell and convey the same in manner above mentioned, and that it shall and may be lawful to and for the said parties of the second part, their heirs and assigns, forever, hereafter to hold and enjoy the said hereby granted premises free and clear of and from all and all manner of impediment or eviction of any person or persons whatsoever, and that the same now is, and shall forever hereafter remain, free and clear from all incumbrances by them made thereof in any manner whatsoever, and that the said parties of the first part and their heirs — the said hereby granted premises, with the appurtenances, unto the said parties of the second part, their heirs and assigns, shall and will warrant, and by these presents forever defend, against all and every person or persons whatsoever; and, lastly, that the said parties of the first part and their heirs, and all lawfully claiming or to
263 claim by, from, or under them, shall and will, at all times hereafter, at the expense of the said parties of the second part, their heirs and assigns, further do acknowledge and execute all such further and other deed or deeds, conveyance or conveyances, in the law, as their counsel learned in the law shall reasonably advise and require.

In witness whereof, the parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

SAMUEL SACKETT. [SEAL.]
ELIZABETH SACKETT. [SEAL.]

Sealed and delivered in presence of—
JAMES B. CLARK.
WH'D KISSAM.
JOHN CAMPBELL.

We, Wynant Vanzandt and John Campbell, Esq'rs, two of the aldermen and justices of the peace of the city and county of New York, in the State of New York, do hereby certify that on the thirty-first day of August, in the year of our Lord one thousand seven hundred and ninety-five, personally appeared before us the within-named Samuel Sackett and Elizabeth, his wife, who reside in the said city, county, and State, and, having signed, sealed, and
264 acknowledged the within mortgage deed in our presence, acknowledged that they executed the same for the uses and purposes therein mentioned; and the said Elizabeth, being examined by us apart from her husband, acknowledged that she executed the same freely and voluntarily, and that she freely relinquishes her right of dower in the lands in the said deed mentioned; and we, finding no material erasures or interlineations except such as are noted, do allow the same to be recorded.

As witness our hands.

WYNANT VANZANDT,
Ald. & Jus. of the Peace.
JOHN CAMPBELL,
Ald. & Jus. of the Peace.

CITY AND COUNTY OF NEW YORK, *ss:*

I, Robert Benson, clerk of the city and county of New York, in the State of New York, do hereby certify that the above-named Wynant Vanzandt and John Campbell are aldermen and justices of the peace in the said city, county, and State, and that due faith and credit is to be given to any act done by them when acting in their official characters.

In witness whereof, I have hereunto affixed the seal of the said county and subscribed my name, this 31st day of August, in the year of our Lord one thousand seven hundred and ninety-five.

ROBERT BENSON, *Clerk.*

265 At a court held for Mason county, the 22d day of December, 1795, this indenture of bargain and sale from Sackett and wife to Conkling & Co. was presented in the court and ordered to be recorded.

Teste: T. MARSHALL, JR., *C. M. C.*

MASON COUNTY, *sct:*

I certify that the foregoing writing, contained on nine pages, is a true copy of a deed of conveyance from Samuel Sackett and Elizabeth, his wife, to Joseph Conkling, Junior, and Sam'l P. Lloyd from the records of my office.

Given under my hand, as clerk of the county court of said county, the 23d day of July, 1817.

MARSHALL KEY.

Endorsed on the back, as follows: Co-deed. Sackett and wife to Conkling & Co. Examined. Filed 1st Aug., 1817. In suit by Pl'tff Hughes. 8,334 acres.

Affidavit of James Hughes, Aug. 1st, 1817.

Personally appeared before me, a justice of the peace for the county of Franklin, James Hughes, who being duly sworn,
266 made oath that he has not in his hands or possession the original deed from John and Wm. Bryant to Sam'l Sackett for 28,334 acres of land, bearing date the first day of May, 1795; that it is not within his power, nor has he ever been able to procure it, nor does he know where it is.

Given under my hand, this 23d day of July, 1817.

O. G. WAGGONER, *J. P.*

Endorsed on the back as follows: Hughes *vs.* Shore's heirs. Aff'd. Filed 1st August, 1817.

Rep. to Johnson's Answer. Filed August 2d, 1817.

JAMES HUGHES
vs.
SHORE'S HEIRS, &c. } In Chancery.

And the said complainant, by his counsel, comes and for replication to the answer of the defendant Johnson he says (*precludi non*), because he says that the entry of Chas. Fleming, set forth in his original bill of complaint herein, was and is so special and notorious as to enable subsequent locators to enter the adjacent residences with safety, and in every respect made according to law, and that
267 the survey made thereon was made and executed according to entry and according to law, and that a patent issued thereupon to the said Chas. Fleming, from whom, as the said complainant has stated in his bill, he hath regularly divided title.

He denies that any or either of the persons through whom he has derived his said title were aliens, and charges that his said title is regularly derived according to law.

He further says that there was, before the institution of this suit, an agreement and compromise entered into between him and the executors of Thos. Marshall, by which they agreed to blend, as to the said moiety mentioned in his bill, the two claims together as far as they interfered, not hereby admitting or confessing the legality of the said entry under which the said defendant Johnson claims or pretends to claim title, but protesting that the said entry of the said Marshall is vague and uncertain; he denies that the said defendant, under his purchase from McConnico, is entitled by the right of ownership to the interest of the said Shore's heirs.

And the said complainant further says and denies that the said entry of Ridgeley is special and notorious or better and su-
268 perior to the claim under which the said complainant derives title.

All which he is ready to verify.

Wherefore he prays as in his original bill.

CHITWOOD,
For Compl't.

Endorsed on the back as follows: Hughes *vs.* Shore's Heirs, &c. Rep. to Johnson's answer. 1817, August 2d. Filed.

Notice to Geo. Johnson, Sept. 15th, 1817.

To GEORGE JOHNSON:

Take notice that on the 20th day of October next, at Henry's tavern, in Georgetown, Scott county, between the hours of ten in the morning and five in the afternoon, I shall take the deposition of General John Payne, and on the 25th of the same month, between the same hours, at the tavern of Abe S. Timberlake, in Greenupsburg, Greenup Co., I shall take the deposition of Jas. Norton, Harvey Gholson, Allen Baker, and Robert Baker, to be read in evidence in the suit in chancery, depending and undetermined in the Greenup circuit court, wherein I am complainant and you and Shore's Heirs are defendants.

Sept. 15th, 1817. JAMES HUGHES.

269 Endorsed on the back as follows: I do certify that Thos. Iles made oath before me, Isaac Gray, justice of the peace for Bath county, that he delivered a true copy of the within notice to Mrs. McIntire, wife of John McIntire (in Fleming county, the place where George Johnson makes his home), on the 11th day of October, 1817. Given under my hand, this 12th day of October, 1817. Isaac Gray, J. P., B. C., Endorsed as follows: Hughes *vs.* Shores' Heirs & Johnson. Notice.

Deposition James Norton, Oct. 25th, 1817.

The deposition of JAMES NORTON, of lawful age, taken at the tavern house of Abe Timberlake, in Greenupsburg, Greenup county, on the 25th day of Oct., 1817, between the hours of ten in the morning and five in the afternoon, to be read in evidence in the suit in chancery, depending and undetermined in the Greenup circuit court, wherein James Hughes is complainant and the Heirs of Thos. Shore, dec'd, and George Johnson are defendants. This deponent, after being first sworn, deposeth and saith:

Question by BENJAMIN AC'LLS:

270 Did you show to the complainant, in 1810, thirteen white oaks and four red oaks near the top of a hill near the the old pack horse tract, represented on the plat, as the beginning corner of Fleming's survey of 16,191 acres?

Answer. I showed to the complainant ten black oaks.

Question by same: Had the complainant a surveyor with him, and did he trace up the lines and corners in your presence to the crossings of Little Sandy?

Answer. The complainant had with him a surveyor and I showed to the complainant ten black oaks near the top of the hill, on the pack horse tract, and went with them until they passed two corners on said survey, but do not recollect what survey it was; one of which

corners stood near John Everman's, and the other stood on the State road, or near it.

And further this deponent saith not.

Given under my hand and seal, this 25th day of October, 1817,

his
JAMES ✕ NORTON.
mark.

I do hereby certify that the foregoing deposition was sub-
271 scribed and sworn to before me, one of the Commonwealth's justices of the peace for Greenup county.

Given under my hand, this 25th day of October, 1817.

BENJ. CHINN,
Justice of the Peace of Greenup County.

Endorsed on the back as follows: Hughes *vs.* Shore's heirs and Johnson. Deposition Jas. Norton. 1817, Oct. 25th, filed.

Deposition of Jas. H. Gholson, Oct. 25th, 1817.

The deposition of JAS. H. GHOLSON, of lawful age, taken at the tavern house of Abe Timberlake, in Greenupsburg, Greenup county, on the 25th day of October, 1817, between the hours of ten in the morning and five in the afternoon, to be read as evidence in the suit in chancery depending and undetermined in the Greenup circuit court, wherein Jas. Hughes is complainant and Thos. Shore's heirs, dec'd, and Geo. Johnston are defendants. This deponent, after being first sworn, deposeth and saith:

Question by BENJ. HILLS:

Were you employed as a deputy surveyor in executing the order of survey in the suit in chancery, James Hughes, complain-
272 ant, against Shore's heirs and George Johnston, defendants, in the Greenup circuit court?

Answer. Yes.

Are the objects represented on the plat and reported correctly represented, laid down, and reported?

Answer. Yes.

Question by same: Do you know of any other fork of Tygart's creek which empties in on the right-hand side; that is, at the mouth, within a mile or two, as near the distance of four miles from the mouth of Tygart's creek, either on a straight line, or by the meanders of Shultz?

Answer. No.

Question by same: Is Shultz the first right-hand fork of Tygart's creek and White Oaks the second; and how far do you suppose the mouth of White Oaks to be above the mouth of Shultz?

Answer. I suppose about seven or eight miles, and White Oaks, or what I call the second fork of Tygart's creek.

Question by same: Are the several lines, corners, and distances described in the report of the survey hereby described and reported?

Answer. Yes.

And further this deponant saith not.

Given under my hand and seal this 25th day of October, 1817.

J. H. GHOLSON.

273 I do hereby certify that the foregoing deposition was subscribed and sworn to before me, on the 25th day of October, 1817.

Given under my hand and seal this 25th day of October, 1817.

BENJ. CHINN,

A Justice of the Peace for Greenup County.

Endorsed on the back as follows: James Hughes *vs.* Shore's heirs and Geo. Johnson. Deposition Jos. H. Gholson. 1817, Oct. 25th, filed.

Notice to Shore's Heirs.

FRANKFORT, *Feb'y 13th*, 1818.

To Jane Grayson Shore, Elizabeth Smith Shore, and Mary Louisa Shore, heirs and representatives of Thos. Shore, dec'd:

Take notice, that on the 30th day of March next, at the house of General John Payne, in Scott county, between the hours of eight in the morning and four in the afternoon, I shall take the deposition of said Payne, and on the first day of April next, at Faris' tavern in Flemingsburg, in Fleming county, between the hours of ten in the morning and five in the afternoon, I shall take the deposition of George Stockton, Sen'r; and on the 2d day of April next,
274 between the same hours, at the tavern of James Morris, in Mayslick, Mason county, I shall take the deposition of Sam'l Strode; and on the 8th day of April, at the house of John Cowan, in Mercer county, between the same hours, I shall take the deposition of the said John Cowan; all of which are to be read in evidence in the suit in chancery depending and undetermined in the Greenup circuit court, wherein I am complainant and you are defendants.

JAMES HUGHES.

FRANKFORT, *Feb'y 13th*, 1818. 524.

We certify that the annexed notice to Jane Grayson Shore, &c., by James Hughes, has been published in the Argus of Western America, five weeks successively, ending March 20th, 1818.

KENDALL & RUPELLE.

Endorsed on the back as follows: Hughes *vs.* Craig. Printer's cert. Hughes to Shore's heirs, &c. Notice.

Here follows report of surveyor.

(Here follows diagram, marked page 475.)

275 JAMES HUGHES
vs.
SHORES' HEIRS, JOHNSON, &c. } In Chancery.

Agreeable to an order of the honorable the circuit court of Greenup, I proceeded to survey the land in controversy between the parties April 1st, 1817, beginning at the mouth of Tygart's creek, thence up the same so. 10 poles, so. 33 e. 64 po., so. 10 e. 36 po., crossing a branch at 150 po. so. 30 e., 14 po. s. 71 e. 18 po., s. 68 e. 10 po., s. 27 e. 20 po., s. 15 w. 22 po., s. 23 e. 15 po., s. 45 e. 13 po., s. 59, e. 26 po., s. 47 e. 45 po., s. 61 e. 52 po., s. 86 e. 48 po., s. 75 e. 17 po., no. 83 e. 32 po., no. 40 e. 17 po., n. 52 e. 18 po., no. 73 e. 54 po., n. 13 w. 24 po., n. 6 e. 20 po., n. 27 e. 24 po., n. 54 e. 28 po., n. 42 e. 36 po., n. 73 e. 10 po., s. 81 e. 36 po., s. 35 e. 32 po., s. 49 e. 23 po., s. 16 e. 27 po., s. 74 e. 30 po., n. 64 e. 54 po., s. 16 e. 68 po., s. 38 e. 20 po., s. 49 e. 60 po., s. 38 e. 68 po., s. 10 w. 18 po., s. 26 e. 29 po., s. 18 w. 40 po., s. 40 w. 35 po., n. 36 w. 39 po., n. 45 w. 58 po., s. 4 e. 57 po., s. 6 w. 22 po., s. 42 w. 10 po., n. 51 w. 52 po., n. 35 e. 36 po., n. 23 e. 40 po., n. 66 w. 34 po., n. 86 w. 69 po., s. 36 w. 30 po., s. 4 e. 32 po., s. 29 e. 23 po., s. 9 w. 20 po., n. 80 w. 22 po., s. 82 w. 46 po., south 19 po., s. 52 e. 42 po., south 36 po., n. 86 e. 60 po., s. 51 e. 34 po., s. 22 w. 40 po., s. 60 w. 32, south 18 po., s. 76 e. 33 po., s. 64 w. 60 po., & crossing little white oak at 50 po., s. 16 w. 54 po., n. 69 e. 72 po., s. 7 e. 16 po., s. 47 w. 78 po., s. 86 e. 46 po., s. 55 e. 34 po., n. 57 e. 36 po., n. 20 e. 40 po., s. 78 e. 39 po., s. 37 w. 34 po., s. 12 e. 34 po., s. 84 e. 18 po., n. 57 e. 36 po., s. 31 w. 29 po., s. 77 e. 26 po., n. 59 e. 41 po., s. 22 e. 80 po., s. 85 e. 54 po., n. 3 w. 20 po., n. 57 w. 26 po., n. 6 e. 16 po., n. 85 e. 26 po., s. 4 w. 28 po., s. 77 e. 60 po., n. 25 e. 76 po., s. 82 e. 108 po., s. 82 w. 44 po., south 20 po., s. 35 e. 38 po., s. 37 w. 84 po., s. 25 e. 24 po., s. 70 e. 62 po., s. 14 e. 24 po., s. 30 e. 32 po., n. 75 w. 31 po., s.
276 45 w. 42 po., s. 34 w. 72 po., s. 9 e. 20 po., n. 85 e. 26 po., n. 56 e. 18 po., s. 85 e. 24 po., s. 33 w. 20 po., n. 72 w. 50 po., s. 3 e. 20 po. to the mouth of Shultz creek, in all 3,982 poles; thence up Shultz creek s. 35 w. 20 po., s. 16 e. 66 po., no. 74 w. 48 po., s. 33 w. 15 po., s. 61 w. 23 po., n. 76 w. 20 po., s. 3 e. 20 po., s. 75 e. 18 po., s. 15 e. 22 po., s. 75 w. 14 po., n. 35 w. 22 po., n. 70 w. 36 po., n. 17 e. 14 po., n. 13 w. 28 po., n. 82 w. 38 po., s. 27 e. 28 po., s. 58 w. 41 po., west 202 po., n. 65 w. 46 po., s. 60 e. 43 po., n. 31 w. 32 po., n. 11 w. 51 po., n. 78 w. 37 po., s. 5 w. 12 po., west 58 poles, n. 19 w. 56 po., s. 52 w. 30, n. 75 w. 57 po., s. 15 w. 23 po., west 136 poles, north 38 poles, s. 40 w. 58 po., s. 50 w. 58 po., s. 85 w. 28 po., s. 5 w. 14 po., s. 30 w. 43 po., s. 6 e. 28 po., s. 80 w. 70 po., s. 23 e. 18 po., s. 72 w. 40 po., s. 85 w. 34 po., s. 79 w. 136 po., s. 46 w. 28 po., n. 72 w. 30 po., s. 55 w. 48 po., s. 40 w. 22 po., s. 17 e. 14 po., s. 69 w. 64 po., s. 4 w. 68 po., s. 30 w. 10 po., west 12 poles, s. 20 e. 20 po., s. 30 w. 61 po., west 22 poles, s. 1, w. 22 po., s. 51 w. 60 po., s. 52 w. 50 po., s. 30 w. 82 po., s. 42 w. 38 po., s. 36 e. 24 po., s. 56 w. 160 po., s. 6 w. 40 po., s. 41 w. 140 po., s. 55 w. 18 po., s. 40 w. 80 po., west 32 poles, s. 65 w. 86 po., s. 25 w. 14 po., s. 75 w. 26 po., s. 27 w. 22 po., s. 80 w. 92 po., s. 54 w. 58 po., passing a branch on the south side at 32 poles, supposed to be the first fork, n. 85 w. 40 po., s. 25 w. 10 po., n. 85 w. 94

po., s. 68 w. 106 po., crossing a branch on the north side at 16 poles, s. 65 w. 92 po., s. 60 w. 100 po., crossing a branch on the north side at 20 poles; also one on the south side at 42 poles; also one on the north side at 96 poles; s. 20 w. up the left-hand fork 248 poles, s. 35 w. 100 poles, crossing a branch on the north side at 18 poles, s. 31 w. 64 po., south 82 poles, s. 7 w. 66 po., south 40 poles, s. 30 w. 67 po., s. 27 w. 28 po., in all, from the mouth of Shultz to the head, 4,593 poles, the beginning of Richard Graham's survey of his 80,406¼ acres, 2 hickories, 2 maples, 2 white oaks, 2 poplars, 2 dogwoods, and 2 sour-woods,
277 both of which are down, the other trees have old marks in the proper bearings; thence with Graham's line, so. 45 e. crossing branch at 42 poles, one at 442 poles, at 1,008 poles, big white oak at 1,280, and branch at 1,982 poles, Tygart's creek at 2,540, again at 2,560 and at 2,820, in all 3,350 poles to his east corner, 10 white oaks, all standing, two of them dead, their mark ancient & in the proper bearings; thence s. 45 w. crossing a branch at 1,678 poles, crossing Tygart's creek at 2,276 poles, a branch at 2,660 and one at 2,950, one called the big branch at 3,110, in all 3,900 poles to Graham's south corner, 8 sugar trees, 4 buckeyes, 1 ash, 1 sycamore marked R. G., standing on the west bank of Tygart's creek, at the mouth of Sarugle's Cave branch; the trees are marked in their proper bearings with ancient marks; thence s. 45 e. 1,000 po. to Alexander Brown's south corner of his 1,600 acre survey, 4 red oaks, 4 white oaks, & 4 chestnut oaks, with ancient marks in their proper bearings; s. 45 e. 260 po. to Fishback & Berry's south corner of their 1,102½ acre survey, 3 poplars marked three sides, old and in their proper bearings; thence s. 45 e. 562¼ po. to Wm. Payne's south corner of his 1,406¼ acre survey, 9 white oaks & 4 black oaks, 1 white oak marked W. R., one marked I. H., standing on a high ridge; the marks are ancient in the proper bearings; thence n. 45 e. with Payne's line 410 poles to his east corner, 1 ash, gum, white oak, hickory, poplar, beech, & sour-wood, all cut down in the State road near & above the Bull's Eye, the stumps remaining, the log hauled out, on the poplar log the marks are plain; thence s. 45 e. with
278 Craddock's line 196 poles to his south corner, 2 white oaks down, one maple down, 2 sugar trees, 1 down, 2 sour-woods, the trees down, have the marks on them, the others are marked in the proper bearings with ancient marks; thence n. 45 e. with Craddock's line, crossing Barret's creek at 70 poles, in all 380 poles, to a forked maple, gum, poplar, 2 sour-woods, & black oak with old mark in the proper bearings; thence n. 65 e. crossing Barret's creek at 380 po. & Little Sandy at 1,060 poles, in all 1,080 poles, to Enoch O'Brien's south corner, all cut down; near the middle lick the stumps remain; thence n. 45 e. with O'Brien's line 600 poles to Minor Winn's line, 2 white oaks, with old marks in the proper bearings; thence n. 45 e. with Winn's line, 635 poles to his south corner of his 7,936 acre survey, no corner found; thence n. 45 e. with Winn's line, 800 to his east corner, not found; thence n. 45 e. with a line of Chas. Fleming's 18,000 acre survey, & passing his corner to Fleming's corner of 20,000 acres, 159 poles, no corner found; thence s. 45 w., crossing the Little fork at 1,240 poles, at 1,268, and 1,300, in

all 2560 poles, to Chas. Fleming's south corner of his 16,191 acre survey, no corner found; thence n. 45 w., crossing Little Sandy at 330 poles, in all 2,007 poles, to Wm. Payne's south corner, the beginning of Chas. Fleming's 16,191 acre survey.

JOHN YOUNG, *S. G. C.*

To running 26,474 po. at 3	88 24
To 2 chain men, 21 days, @ 1612½ each	47 25
To 1 platt, 14 surveys	7 50
To 1 " do	3 25
To 17 objects @ 9 cts.	1 63
Laying Shore & McConnico's 8,000 acres	1 50
	149 37

279 *Deposition General John Payne. Filed May 2d*, 1818.

The deposition of General John Payne, taken at his own house, in Scott county, this 30th day of March, 1818, according to notice, to be read in evidence in the suit in chancery, depending and undetermined, in the Greenup circuit court, wherein James Hughes is complainant and Thos. Shore's Heirs and George Johnston are def'ts.

The said John Payne, being of full age and duly sworn, deposes and says: That in the spring of the year 1785 he was on Tygar's creek, and then knew it by that name that he went there for the purpose of making surveys; that he ran two lines of Graham's 80,406¼ acre survey, and lines of several others; that before that year he had no personal knowledge in that part of the country, but he supposes the said creek had the name of Tygart's creek before that time, from knowing that the entries of Andrew Dullin and Simon Kenton for 5,119 acres, George Mason and Simon Kenton for 5,496 acres, and Wm. Bird for 4,849 acres, calling for the creek by that name, had been made early in 1783, part of which he surveyed at that time, and that the entry of Graham for 80,406¼ acres made in the same year, also called for a fork of Tygart's creek.

280 And further this deponent saith not.

JOHN PAYNE.

SCOTT COUNTY, *To wit:*

Personally appeared before me, a justice of the peace for the said county, Gen'l John Payne, who being duly sworn, made oath that what is contained in the above deposition is true, to the best of his knowledge and belief.

Given under my hand this 30th day of March, 1818.

JOHN BRANHAM, *J. P.*

Notice to Johnson. May 28th, 1818.

TO GEORGE JOHNSON:

Take notice that on the 20th day of October next, at Henry's Tavern, in Georgetown, Scott county, between the hours of 10 in the morning and five in the afternoon, I shall take the deposition of

Gen'l John Payne, and on the 25th day of the same month, between the same hours, at the tavern of Abe. S. Timberlake, in Greenupsburg, Greenup county, I shall take the deposition of James Norton, Harvey Gholson, Allen Baker, and Robert Baker, to be read in evidence in the suit in chancery, depending and undetermined in the Greenup circuit court, wherein I am complainant and you and Shore's Heirs are defendants.

Sept. 15th, 1817.

JAMES HUGHES.

281 Endorsed as follows:

I acknowledge service of the within notice, this 10th day of Oct., 1817.

GEORGE JOHNSON.

Teste: CUTH. V. BANKS.

Notice to Shore's Heirs. July 16th, 1818.

To Jane Grayson Shore, Elizabeth Smith Shore, and Mary Louisa Shore, heirs of Thos. Shore, dec'd:

Take notice, that on the 15th day of July next, at the house of John Cowan, in Mercer county, between the hours of ten in the morn- and six in the afternoon, I shall take the said Cowan's deposition; and on the 20th of July next, at the tavern of B. B. Stith, in the town of Washington, Mason county, between the same hours, I shall take the deposition of Sam'l Strode and Robert Pogue, all of which are to be read in evidence in the suit in chancery, depending and undetermined in the Greenup circuit court, wherein I am complainant and you and Geo. Johnson are defendants.

JAMES HUGHES.

June 17th, 1818. 77-4 W.

We hereby certify that the above notice has been published in the Commentator, printed at Frankfort, in four successive papers,
282 commencing with the 19th of June and terminating the 10th of July, 1818.

BLEDSOE & FARNHAM.

Frankfort, July 16th, 1818.

Deposition of Robert Pogue. July 20th, 1818.

The deposition of Robert Pogue, taken this 20th day of July, in the year 1818, between the hours of ten in the morning and six in the afternoon, at the tavern of Baldwin B. Sleth, in the town of Washington, Mason county, to be read in evidence in the suit in chancery depending in the Greenup circuit court, wherein James Hughes is complainant and Geo. Johnson and The Heirs of Thos. Shore are defendants.

This deponent, being of lawful age, and first duly sworn, deposeth and saith: That the creek now called Tygart's creek empties into the Ohio river about five miles above the mouth of the Scioto, on the opposite side of the said Ohio river; that the water-course now

called the Scioto has had that name ever since he has known it, and he has no doubt had that name prior to the 10th day of January, 1783, for he thinks he has frequently heard it named as early as the year 1776; that he is acquainted with the following claims, to wit: Andrew Dullin and Simon Kenton,
283 5,119 acres, entered January the 10th, 1783, and surveyed the 18th of March, 1785; George Mason and Simon Kenton, 5,496 acres, entered, as well as I now recollect, about the same time, and surveyed upwards of 2,700 acres about the year 1798, and William Byrd, 4,849 acres, entered about the same time and surveyed in 1798; that they all lie on the said Tygart's creek, and that Richard Graham's claim of 80,406¼ acres lies on the waters of Tygart's creek; that the survey is began near the head of Shultz, a right-hand fork of Tygart's creek, which I think empties into said creek about four miles above the mouth. About the year 1806 James Hughes employed this deponent to go on the ground and examine whether the calls of R. Graham's entry agreed with the measurement on the ground or not. He measured from the mouth of Tygart's creek, and measured up the distance named in Graham's entry, which brought him near to the mouth — Shultz, and there was no other branch at the end of the distance as near as the mouth of Shultz. He accordingly measured up Shultz, having no doubt but that was the right fork, and he found the beginning corner of Graham's survey of 80,406¼ acres near the head of said fork, without having
284 any person to direct him, only from a copy of the entry and survey, which was furnished him by said Hughes; and further this deponent saith not.

ROBERT POGUE.

MASON COUNTY, *set:*

The foregoing deposition of Robert Pogue was taken, subscribed, and sworn to, at the time and place in the caption mentioned, before the undersigned, a justice of the peace in and for said county.

Given under my hand, this 20th day of July, 1818.

JAS. ELLIS.

Magistrate's fees----	$1 00
2 witnesses' " ----	1 00
	$2 00

Paid by pl't'ff. JAS. ELLIS.

Copy Entries. Filed July 21st, 1818.

1785, March 31st, Richard Adams withdraws his entry of 20,000 acres, made on four T. w'ts to No. 2, on page 115 of this book, and re-enters the same again as follows, to wit: Beginning 1,264 poles S. 45° east from the east corner of Richard Graham's 80,406¼ acres entry, thence S. 45° east to the east corner of an 18,000 acre entry made for Chas. Fleming, then at right angles from said Fleming's line far enough to include the quantity.

285 Exam'd. A copy.

Test: ARCHILLES SNEED, *Clk.* 44.

17—414

1785, April 5th, James Wilkinson, Alex'r Dow, Benjamin Grayson and William Marshall, Jun'r, as tenants in common, each to hold in proportion to his warrants, enters 37,256 acres of land. Their proportions are as follows, viz: Jas. Wilkinson to hold 10,000 acres on five Treasury warrants of 2,000 acres each, Nos. &c., &c., &c., on the waters of the Ohio, beginning at the south corner of Chas. Fleming's entry of 18,000, running thence northeast to the east corner of Richard Adams' 20,000 acre entry, thence N. W. 800 poles, thence N. E. 1,200 poles, thence S. E., and from the beginning S. E. so far that a line drawn from one extremity to the other and at right angles to both shall include the quantity to be laid off in one or more surveys.

Exam'd. A copy.

Test: ARCHILLES SNEED, *Clk.* 44.

1785, April 5th, Charles Fleming withdraws 20,000 acres of his entry of 23,750 acres, made in page 138 of this book, on part of a T. w'nt No. 20355, it being that part which is taken away by prior claims, and re-enters the same as follows, (viz): Beginning at
286 the S. corner of an entry of 37,256 acres, made by General James Wilkinson, Alex'r Dow, Benj. Grayson, and Wm. Marshall, Jun'r, running thence S. 45° west 2,560 poles, thence N. 45° west so far that a line parallel to the first shall include the quantity to be returned in one or more surveys.

Examined. A copy.

Test: ARCHILLES SNEED, *Clk.* 44.

1785, April 28th, Charles Fleming enters 26,373 acres of land on part of a T. w'nt No. &c., beginning at the south corner of Wm. Payne's 1,406¼ acre entry, thence N. 45 east 400 poles to Chas. Craddox's line; thence south 45 east 194 poles to his corner; thence north 45 east 380 poles; thence south 45 east of Enoch O'Bryan's south corner; thence N. 45 east 600 poles to Minor Winn's line; thence south 45 east 635 poles to Minor Winn's south corner; thence north 45 east 800 poles to Minor Winn's east corner; thence south 45 east 751 poles to the north corner of Charles Fleming's 20,000 acre entry; thence south 45 west 2,560 poles to his west corner; thence north 45 west to the beginning.

Exam'd. A copy.

Test: ARCHILLES SNEED, *Clk.* 44.

1735, February 2d, Chas. Fleming enters 18,000 acres of
287 land on part of a T. w'nt No. 20345, on the waters of the Ohio, beginning at the east corner of William Fitzhugh's 12,000 acre entry, running thence S. 45 west with his line 4 miles; thence at right angles southeast so far that a line parallel to the first shall include the quantity.

Exam'd. A copy.

Test: ARCHILLES SNEED, *Clk.* 44.

Deposition of Samuel Strode. July 26th, 1818.

The deposition of Samuel Strode, taken on the 20th day of July, 1818, between the hours of ten in the morning and six in the afternoon, at the tavern of Baldwin B. Sleth, in the town of Washington, Mason county, to be read as evidence in a suit in chancery, depending and undetermined in the Greenup circuit court, wherein James Hughes is complainant and Geo. Johnson and Shore's Heirs are defendants.

This deponent being of full age, and first duly sworn, deposeth and saith that he believes the water-course now called Tygart's creek, which empties into the Ohio river about five miles above the mouth of the Scioto, on the southwardly side, was generally known and called by that name prior to the thirteenth day of October, 1783.

SAMUEL STRODE.

288 MASON COUNTY, *set:*

This deposition was subscribed and sworn to before me, one of the justices of the peace in and for the county aforesaid, the day above mentioned.

Given under my hand, this 20th day of July, 1818.

JAS. ELLIS.

Notice. Filed Oct. 31st, 1818.

To Jane Grayson Shore, Elizabeth Smith Shore, and Mary Louisa Shore, heirs and representatives of Thos. Shore, dec'd, and George Johnson:

Take notice that on the 30th day of March next, at the house of General John Payne, in Scott county, between the hours of eight in the morning and four in the afternoon, I shall take the deposition of the said Payne. And on the first day of April next, at Farris' tavern, in Flemingsburg, Fleming county, between the hours of ten in the morning and five in the afternoon, I shall take the deposition of George Stockton, Sen'r; and on the second day of April next, at the tavern of James Morris, in Mayslick, Mason county, I shall take the deposition of Sam'l Strode; and on the 8th day of April, at
289 the house of Jno. Rowan, in Mercer county, between the same hours, I shall take the deposition of the said Jno. Rowan, all of which to be read in evidence in the suit in chancery, depending and undetermined in the Greenup circuit court, wherein I am complainant and you are defendants.

Frankfort, Feb'y 13th, 1818.

JAMES HUGHES.

Endorsed as follows: Executed by giving a true copy of the within notice on the 24th of March, 1818. Wm. Gerrett. I acknowledge service of the within notice, this 24th March, 1818. George Johnson.

Bill of Revivor. Nov. 2d, 1818.

JAMES HUGHES
vs.
SHORE'S HEIRS & JOHNSON. } In Chancery.

To the hon. judge of the Greenup circuit court, in chancery sitting:

Your oratrix, Ann Hughes, by her counsel, and your orators, Robert Hughes, James Hughes, and your oratrix's Patsey Hughes and Elizabeth Hughes, who are infants, under twenty-one years of age, by their special guardian and next friend, Joshua Humphreys, respectfully shew to your honor that their ancestor, James
290 Hughes, in his lifetime instituted a suit in chancery in this honorable court against Shore's heirs & Johnston.

They further shew that since the last term of this honorable court their said ancestor James departed this life intestate, leaving your petitioners his heirs at law. Your petitioners therefore pray that said suit may stand revived in their names as complainants, and that process issue against said defendant, and that your honor will grant to them the relief prayed for by their ancester whilst the suit stood in his name, and such other and further relief as to equity may belong.

And they will ever pray, &c.

JAMES A. PAXTON,
Att'y for Compl'ts.

Answer of George Johnson. Filed Nov. 3d, 1818.

JAMES HUGHES
vs.
SHORE'S HEIRS & JOHNSTON.

The answer of George Johnston to a bill of revive filed by Ann Hughes and the other heirs of James Hughes, dec'd.

This respondent admits the death of said James Hughes, and that he departed this life leaving the heirs as stated in their bill of
291 revivor. He having answered the said the bill of revivor, prays to be dismissed with his costs as in his original bill.

W. DANIEL,
For the Def't Johnston.

Deposition to Prove Chas. Fleming's Will. November 5th, 1818.

The Commonwealth of Kentucky to any presiding judge, mayor of any town or city, or notary public in the State of Virginia, Greeting:

Know ye that we, trusting to your fidelity and provident circumspection in diligently examining Robert Haskins, Jr., John Brusford, Josiah Leak, Jr., Thos. Watkins, and Daniel Boisseau, subscribing witnesses to the last will and testament of Chas. Fleming, deceased, we therefore command you that at a certain time and place, by you

to be appointed, you assemble yourselves, and the witnesses aforesaid before you, you call and cause to come the said Robert Haskins, Jr., John Brusford, Josiah Leak, Jr., Thos. Watkins, and Daniel Boisseau, and them diligently examine, on oath, touching the premises, and that you certify in this manner such acts as are usually authenticated by you: that the witnesses aforesaid personally appeared before you and made oath that the testator signed and
292 published the said will as his last will and testament, and that the copy attached to this commission is a true copy of the original (or that some other person signed it by his direction, as the case may be); that he was of disposing mind and memory, and that they subscribed their names thereto in the presence of the testator, and at his request; and their examination so taken before you, you shall send and certify under your hand and seal, together with the copy hereto annexed, endorsed to our justices of our county court of Greenup county, and this writ.

Witness John Hockaday, clerk of our said court, at the courthouse, this 5th day of November, 1818, and in the 27th year of the Commonwealth.

JOHN HOCKADAY.

Deposition Josiah Leak. November 28th, 1818.

The deposition of Josiah Leak, taken before me, Eleazer Clay, presiding justice of the peace for Chesterfield county, pursuant to a *dedimus* to me directed, from the county court of Greenup, in the Commonwealth of Kentucky, to be read in said county court as evidence of the execution of the will of Charles Fleming, dec'd.

293 This deponent being of lawful age, and first duly sworn, deposeth and saith: That he has this day examined the will of Charles Fleming, dec'd, which is recorded in the office of Chesterfield county court, to which he is a subscribing witness. He says said will was signed and published by said Chas. Fleming as his last will and testament; that at the time of the execution of the same the testator was of sound and disposing mind and memory. And further, this deponent signed his name as a subscribing witness to said will in the presence and with the consent of the testator. This deponent further says that he has compared the copy annexed, on the back of which he has written his name with the original, and finds it to be a true copy. And further this deponent saith not.

JOSIAH LEAK.

VIRGINIA, *Chesterfield*, } *To wit:*

This deposition of Josiah Leak was this day taken, subscribed, and sworn to before me, Eleazer Clay, the presiding justice of the peace for Chesterfield county.

Given under my hand and seal this 28th of November, 1818.

ELEAZER CLAY. [SEAL.]

294 *Deposition Robert Haskins. November 30th*, 1818.

The deposition of Robert Haskins, taken before me, Eleazer Clay, presiding justice of the peace for Chesterfield county, pursuant to a *dedimus* to me directed from the county court of Greenup, in the Commonwealth of Kentucky, to be read in said county court as evidence of the execution of the will of Chas. Fleming, dec'd.

This deponent being of lawful age, and first duly sworn, deposeth and saith: That he has this day examined the will of Chas. Fleming, which is recorded in the office of Chesterfield county court, to which he is a subscribing witness. He says said will was signed and published by said Chas. Fleming as his last will and testament; that at the time of the execution of the same the testator was of sound and disposing mind and memory. And further, this deponent signed his name to said will as a subscribing witness in the presence and with the consent of the testator. This deponent further says he has compared the copy annexed, on the back of which he has written his name with the original, and finds it to be a true copy.

And further this deponent saith not.

295 R. HASKINS.

VIRGINIA, *Chesterfield*, } *To wit:*

The deposition of Robert Haskins was this day taken, subscribed, and sworn to before me, Eleazer Clay, presiding justice of the peace for Chesterfield county.

Given under my hand and seal, this 30th of November, 1818.

ELEAZER CLAY. [SEAL.]

VIRGINIA, *Chesterfield County*, } *set:*

I, Parke Poindexter, clerk of Chesterfield county court, do hereby certify that Eleazer Clay, whose signature is affixed to the annexed affidavits, is the presiding justice of the peace in and for the county aforesaid, and that full faith and credit ought to be given to all his legal official acts as such.

In testimony whereof, I have hereunto set my hand and have caused the official seal of my said county to be affixed, this 3d day of December, 1818, and in the 43d year of our Independence.

[SEAL.] PARKE POINDEXTER, *Clerk.*

296 *Notice to Defendants, their Agents & Attorneys. March* 4, 1819.

JAMES HUGHES' HEIRS

vs.

GEO. JOHNSON, and THE HEIRS OF THOS. SHORE, dec'd, to wit, Elizabeth Smith Shore, Jane Grayson Shore, and Mary Louisa Shore.

In a suit pending in the Greenup circuit court, the defendants, their agents and attorneys, are notified that depositions will be taken to be read in evidence in the above cause at the time and place

herein expressed, to wit, on Monday, the 5th day of April next, between the hours of six o'clock in the morning and six in the evening, at the house of James Sanduskey, in the county of Bourbon, adjourning from day to day until completed; on Monday, the 12th day of April, between the same hours, and to continue from day to day as aforesaid, at the house of Jacob Sandusky, in the county of Woodford; on Wednesday following, between the same hours, continuing from day to day as aforesaid, at the house of John Smith, also in Woodford county; and on Monday, the 26th day of April, between the same hours, adjourning from day to day as aforesaid, at the office of John M. McConnell, Esq., at the town of Greenupsburg.

JOSH. HUMPHREYS,
For Hughes' Heirs, Guardian.

To HENRY DANIEL, Esq.

297 Endorsed as follows: Executed by delivering a copy of the within notice to Henry Daniel on the 4th day of March, 1819. W. Thomas, for A. Hall, S. M. C'ty.

Copy of Will of Chas. Fleming, March 26th, 1819.

In the name of God, amen. I, Chas. Fleming, of Chesterfield county, being of sound mind and memory, do make, publish, and ordain this my last will and testament. After my just and legal debts are fully paid, I will and desire the following distribution of all my real and personal estate, both in the State of Virginia and of Kentucky:

First. I give all my real estate which lies and is situated in the State of Kentucky to my brother, Wm. Fleming, and my two nephews, John Bernard, Jr., and Richard Bernard, in trust, to be sold for the benefit of my creditors, and to pay such legacies as shall be hereafter directed, which real estate consists of the following tracts and parcels of land, viz: One tract of land lying in the county of Mason, and situated on the waters of the Ohio river, containing eighteen thousand acres; also one other tract, lying in the same
298 county, and situate in the same waters, containing twenty thousand acres; also one other tract in the same county, and containing sixteen thousand one hundred and ninety-one acres; also one tract lying on the mouth of Glenn's creek, about four miles from Frankfort. Only one moiety of the above tracts and parcels of land being mine, is all that give the aforesaid trustees for the above-mentioned purposes after my debts are discharged by the money arising from the sale of my land by the above-mentioned trustees. Of the remainder or residue of the money arising from the sale of my land I give and bequeath one-fifth part to my two nieces, May Lewis, and Susanna Lewis, their heirs or assigns, forever.

Item.—I give and bequeath to my brother, Wm. Fleming, John Bernard, Jr., and Richard Bernard, in trust for my sister, Mary Bernard, or for her surviving children, two-fifths of the aforesaid residue or remainder to them, their heirs or assigns, forever, by which I mean that the aforesaid two-fifths shall be appropriated by the said trustees to the support and maintenance of my sister, Mary Bernard, for her

life, and after her death to be equally divided among such of her children as shall survive her, or their representatives.

299 Item.—I give and bequeath the remaining two-fifths of the first-mentioned residue to my brother, William Fleming, his heirs and assigns, forever. I appoint my brother, Wm. Fleming, sole executor of this my last will and testament, hereby revoking all former wills.

In witness whereof I have hereunto set my hand and seal, this eighth day of October, one thousand seven hundred and ninety-three.

Tests: CHARLES FLEMING. [SEAL.]
ROBT HASKINS, JR.
JOHN BINSFORD.
JOSIAH LEAK, JR.

DECEMBER THE 8TH, 1794.

In Chesterfield County Court.

The last will and testament of Chas. Fleming, dec'd, was produced in court by Wm. Fleming, ex'or therein named, proved by the oaths of Robert Haskins and John Binsford, witnesses thereto, and ordered to be recorded; and on the motion of the said executor, who gave bond and took the oath required by law, a certificate of having obtained a probate in due form is granted him.

STATE OF VIRGINIA, *Chesterfield County,* } *To wit:*

I, Thos. Watkins, clerk of the Chesterfield county court, do
300 certify that the foregoing is truly copied from the records of my office.

In testimony whereof, I have hereunto subscribed my hand and have caused the official seal of the said county to be affixed, this 20th day of January, anno Dom'i one thousand eight hundred and eleven, and in the 35th year of our foundation.

THOS. WATKINS, C.

STATE OF VIRGINIA, *Chesterfield County,* } *set:*

I, Daniel Boisseau, presiding justice of the peace for the county aforesaid, do certify that the foregoing certificate of attestation, which is signed by Thos. Watkins, clerk of Chesterfield county court, is made in due form of law.

Given under my hand and seal this 26th day of January, anno Dom. 1811, and in the 35th year of our Independence.

DANIED BOISSEAU. [SEAL.]

At a county court held for Greenup county, on Monday, the 22d day of February, 1819, this copy of the last will and testament of Chas. Fleming, dec'd, was proved to be a correct copy of the original will of the said testator by the oaths of Josiah Leak, Jr., and
301 Robert Haskins, Jr., two of the subscribing witnesses to said original will, and that the said will was signed and published

by the said Chas. Fleming as his last will and testament, and that he was of sound and desposing mind and memory; that they signed their names as subscribing witnesses to said will in the presence and with the consent of the testator, and thereupon the said copy is ordered to be recorded, which is accordingly done.

JOHN HOCKADAY, *C. G. C.*

A copy.
Test: JOHN HOCKADAY, *C. G. C. C*

I do hereby certify that the foregoing is a correct copy of a copy of the last will and testament of Chas. Fleming, dec'd, and certificates thereon endorsed, as recorded in my office.

Given under my hand, as clerk of the county court of Greenup county, June 5th, 1819.

JOHN HOCKADAY.

Deposition of Jacob Sandusky. April 27th 1819.

The deposition of Jacob Sandusky, taken at his house, in the county of Woodford, in the State of Kentucky, on this 12th day of April, 1819, to be read in evidence in the chancery suit depending in the Greenup circuit court, wherein the heirs of James
302 Hughes, deceased, are complainants, and Geo. Johnson and Shore's Heirs are defendants, who, being duly sworn according to law, deposeth and saith:

Question by JOSHUA HUMPHREYS, on the part of the complainants. When was your first knowledge of the different rivers, creeks, and say streams, which enter the Ohio river, between the mouth of the Shannatowa or Kanawa river, and —— on this side of the Ohio?

Answer. In the year 1774 the deponent came in company with the surveyor, who was to lay off the military lands in the State of Kentucky. We came down the Ohio river and stopped at almost all the water-courses and bottoms from the mouth of Kanawa down to the fall of Ohio, and also, in the year 1775, we came down the Ohio nearly in the same order as the preceeding year, down to the mouth of Kentucky.

Question by same. Among the names of other streams entering the Ohio, do you recollect one by the name of Tygart; if you do, please state at what time you became acquainted with it or knew it to bear that name, where it was situated, and at what time do you believe it became generally known by that name?

303 Answer. My impression is that there was a creek called Tygart amongst those which we visited in the year 1774–'75, somewhere about the mouth of Scioto river, on the Kentucky side of Ohio. This deponent thinks it was well known by that name before the year 1779, by people traveling up and down the Ohio river; and further this deponent saith not.

WOODFORD COUNTY, } *set:*
Commonwealth of Kentucky, }

The foregoing deposition was taken at the house of Jacob Sandusky, in Woodford county, on Monday, the 12th day of April, be-

tween the hours of ten o'clock and six o'clock, 1819, and subscribed and sworn to before me, one of the justices of the peace for said county, according to law.

Given under my hand, the day above written.

PORTER CLAY, *J. P.*

Fee for taking the depo.:

Payment rec'd	$1 00
Witness' attendance	6 00

PORTER CLAY, *J. P.*

Deposition of James Sandusky. April 27th, 1819.

The deposition of James Sandusky, taken at his own house,
304 in the county of Bourbon, State of Kentucky, on this 5th day of April, in the year 1819, to be read in evidence in the chancery suit depending in the Greenup circuit court, wherein the Heirs of James Hughes, dec'd, are complainants, and Geo. Johnson and Shore's Heirs are defendants, who, being duly sworn, deposeth and saith:

Question on the part of complainants by JOSHUA HUMPHREY'S:

In what year was your first knowledge of Tygart's or Tagert's creek, by that name, which enters the Ohio river on the Kentucky side, not far from the mouth of the Scioto?

Answer by the deponent. I have known the creek which empties into the Ohio river between four and six miles (on the Kentucky side) above the mouth of the Scioto river ever since the year 1773, and in a conversation with Simon Kenton in the year 1779 or earlier, he told me that the name of the creek was Tigert; in the same conversation with Kenton, he told me he had remained about Kenneday's Bottom for some time, and up and down the river Ohio, by which means he became acquainted with a number of the creeks by their name.

Question by the same. Was the creek at the time generally known by the name of Tigart's creek?

305 Answer by the deponent. I think it was; and further, saith not.

his
JAMES x SANDUSKY.
mark.

I do certify that the foregoing deposition of James Sandusky was subscribed and sworn to before me, one of the justices of the peace for the county of Bourbon, on the 5th day of April about 12 o'clock.

Given under my hand.

JAMES McCLELLAND.

Witness claims—

One day's attendance	$0 50
Mess'er	1 00
	$1 50

Power of Attorney. Geo. Johnson to Henry Halbert. Oct. 28th, 1819.

Be it known that I, George Johnson, of the State of Kentucky, do hereby constitute and appoint Henry Halbert my true and lawful attorney for me and in my name to bring suit and recover any matter or thing that I may have claim in the county of Greenup, and for me and in my name to sell, alien, and convey by deed or deeds any lands that I may have claim to in said county, and to recover any debts that may be due to me, and to grant receipts or discharges for the same in as full and ample a manner as I
306 myself could or ought to do were I personally present, hereby revoking all powers of attorney by me heretofore made.

Sealed with my seal, and dated this 2d day of April, 1819.

G. JOHNSON. [SEAL.]

CHRISTIAN COUNTY, *to wit:*

CLERK'S OFFICE, *3d April*, 1819.

The within letter of attorney from George Johnson to Henry Halbert was on this day produced by me, John Clark, clerk of the county court for the county aforesaid, and acknowledged by said Johnson to be his act and deed, hand and seal, for the purposes therein, which is hereby certified to the clerk of Greenup county court for record.

In testimony whereof, I have hereunto set my hand, the date aforesaid.

JOHN CLARK, *Clk.*

STATE OF KENTUCKY, } *set:*
Greenup County, }

I do hereby certify that this power of attorney from George Johnson to Henry Halbert, together with the foregoing certificate thereon endorsed, was produced to me in my office as clerk of the county court of said county of Greenup on the 28th day of October, 1819, and by virtue of said certificate; the said power of attorney
307 and certificate have been duly recorded in my office.

Attest: JOHN HOCKADAY, *C. G. C. C.*

A copy.
Teste: JOHN HOCKADAY, *C. G. C. C.*

Co-Deed. Geo. Johnson to John Trimble. October 29th, 1819.

This indenture, made this 29th day of October, 1819, by and between Geo. Johnson, by his attorney-in-fact, Hervey Halbert, of the one part, and John Trimble, of the other part, all of the State of Kentucky, witnesseth: That the said Geo. Johnson claims title to certain tracts and parcels of land, and parts of tracts of land, lying in the county of Greenup, and State of Kentucky, and it being doubtful whether the legal title is vested in him, or only an equity, and it being the intention of the said Geo. Johnson to transfer, assign, and convey the same in fee to the said John Trimble, and pass all the title he has thereto, be the same legal or equitable:

Now, therefore, the said George Johnson, for and in consideration

of the sum of one dollar, to him the said George in hand paid, and for the further sum of six hundred dollars, in hand paid to the said Hervey Halbert, attorney-in-fact for said George, the receipt
308 of which is hereby acknowledged, he, the said George Johnson, hath sold, set over, and conveyed, and doth by these presents assign, set over, transfer, and alien, convey, bargain, sell, and confirm unto the said John Trimble all the right, title, and interest of him the said Geo. Johnson to and in the said tract and part and parcels of land before referred to, in fee simple, to have and to hold the same to the said John Trimble and his heirs forever, be the title of said Geo. Johnson legal or equitable, one of which tracts of land, in which said Johnson is supposed to hold the legal title, is a tract of four thousand acres lying on Little Sandy, in the county aforesaid, and another patented to Marshal, Shore and McConnico, lying on the same creek, in the same county, containing eight thousand acres, be the same more or less.

In testimony whereof, the said George Johnson hath hereunto set his hand and seal by his attorney-in-fact, the said Hervey Halbert, this 29th day of October, 1819.

GEO. JOHNSON, [SEAL.]
By his attorney-in-fact, HERVEY HALBERT.

STATE OF KENTUCKY, *Greenup County,* } *sct.:*

I do hereby certify that this deed of transfer from Geo.
309 Johnson by his attorney-in-fact, Hervey Halbert, to John Trimble was produced to me in my office, as clerk of the county court of said county, on the 29th day of October, 1819, and acknowledged by the said Hervey Halbert, as attorney-in-fact, as aforesaid, to be his act and deed, and the same has been duly recorded.

Attest: JOHN HOCKADAY, *C. G. C. C.*
A copy. Teste: JOHN HOCKADAY, *C. G. C. C.*

Deed. J. Trimble to Dawson and Davis. July 28th, 1820.

This indenture, made this 28th day of July, 1820, between John Trimble (by David Trimble, his att'y-in-fact), of the one part, and Geo. N. Davis and Nathaniel Dawson, of the county of Greenup and State of Kentucky, of the other part, witnesseth: That the said John Trimble, for and in consideration of one dollar to him in hand paid, and for the further consideration of two hundred and fourteen dollars and twenty-five cents, which they have agreed to pay for him to David Trimble, to whom he owes that sum, hath granted, bargained, and sold, and doth by these presents grant, bargain, sell, alien, convey, and confirm unto them all the right, title, and interest which he holds (to and in two tracts of land, lying and
310 being on Little Sandy, in the county and State aforesaid) under a deed from George Johnson to him, directed on the 29th day of October, 1819, which deed is recorded in the Greenup county court's office, in lib*a* C, folio 329, and the power of attorney in virtue of which the same was made is likewise recorded in the

same office, the metes and bounds of which claims may be known by referring to the two patents, one of which was issued to Geo. Johnson for four thousand acres, dated on the second day of June, 1800; and the other was issued for 8,000 acres to Thos. Marshall, Thomas Shore, and Christopher McConnico, dated on the 16th day of October, 1788. To have and to hold the right, title, and interest of said John Trimble to and in said lands, as he now holds the same under said Johnson, to them and their heirs forever, to the proper use and behoof of them and their said heirs, but without any warranty and without any recourse to said John Trimble or his heirs in any event whatever, it being agreed expressly that said J. Trimble is not in anywise to be made responsible for the validity of said Johnson's title, right, or interest, or his ——— as acquired under Johnson, or for any quantity of land, it being known that Johnson has made various sales of parts of said tracts, and, among
311 others, has executed, as is said, a deed to Henry Daniel for all his lands in Greenup county, nor is said John Trimble to be responsible for any matter or thing touching the premises, and they, the said Geo. N. Davis and Nathaniel Dawson, agree to take this deed at all chances and hazards, and do hereby release the said John Trimble from all and every kind of recourse for or on account of defects under the title of said Johnson, or any adverse title, right, or claim, or any other matter or thing whatever.

In testimony whereof, the said John Trimble, by his said attorney-in-fact, David Trimble, hath hereunto set his hand and seal the day and date first above written.

JOHN TRIMBLE, [SEAL.]
By DAVID TRIMBLE,
His Attorney-in-Fact.

STATE OF KENTUCKY, }
Greenup County, } *set:*

I do hereby certify that this indenture from John Trimble, by his attorney-in-fact, David Trimble, to Geo. N. Davis and Nathaniel Dawson was produced to me in my office, as clerk of the county court of said county, on the 28th day of July, 1820, and ac-
312 knowledged by the said David Trimble, att'y-in-fact, as aforesaid, to be his act and deed, and the same has been duly recorded.

Attest: JOHN HOCKADAY, *C. G. C. C.*

A copy.
Teste: JOHN HOCKADAY, *C. G. C. C.*

Exceptions. Filed July 29th, 1820.

JAMES HUGHES' HEIRS, &c. }
vs. } In Chancery.
JOHNSON, SHORE'S HEIRS, &c. }

Be it remembered that on this day Nathaniel Dawson and George N. Davis produced here in court their petition to be admitted defendants in this suit, upon the grounds and for the reasons therein

stated (which is here referred to). They also produced their answer (which is here referred to), to the filing of which, and to the admitting of the said Davis and Dawson as def'ts in this cause the complainants objected, but their objections were by the court overruled, and the said petition and answer were permitted to be filed, and the said Dawson and Davis permitted to come in as def'ts in the suit under the terms and conditions in the record mentioned; to which opinion of the court the complainants, by their counsel, except, and pray that this their bill of exceptions may be signed and sealed by the court and made part of the record, which is done accordingly.

313 E. SHORTRIDGE. [SEAL.]

Petition and Answer. Davis & Dawson. Filed July 29th, 1820.

To the hon. the judge of the Greenup circuit court, in chancery sitting:

The petition of Nathaniel Dawson and George N. Davis shows: That there is a suit in chancery now depending in the Greenup circuit court, wherein the Heirs of James Hughes, deceased, are complainants and George Johnson and others are defendants; that they have acquired no interest under the defendant, George Johnson, to transfers and deeds of conveyance to and in part of the lands in contest as formerly held by said Johnson. Since which interest has been acquired they have caused their counsel to examine the suit, and by him they are advised to say and state that the defendant Johnson has failed to make the necessary and proper defence, and that if the cause is tried upon the facts now put in issue by the defendant Johnson, their interests and rights will be greatly prejudiced, if not entirely sacrificed, unless your petitioners are permitted to make themselves defendants to protect their rights.

Wherefore they pray your honor to let them in as defend-
314 ants, and for that purpose they here offer their answer, in which they have set forth the right, title, and interest which they hold in the said land for which Johnson is sued, as before stated.

And they will ever pray, &c.

The answer of George N. Davis and Nathaniel Dawson to a bill in chancery, exhibited in the Greenup circuit court by the Heirs of James Hughes, dec'd, against The Heirs of Thos. Shore and George Johnson, &c., shows and charges:

That on the — day of ——, one —— —— made an entry in the following words for 4,000 acres of land in the proper office, viz:

Enters 4,000 acres, &c., an attested copy of which entry is to be filed, and is prayed to be taken as a part of this answer.

That the said entry is special and precise, and calls for objects notorious and well known, both at and before its date, as they are advised to say to put the fact in issue, and for the same purpose they charge that said entry was surveyed agreeably to law and location, or nearly so, and that such transfers were made thereon and on

the plat and certificate of survey; that the grant issued to
315 George Johnson for the said 4,000 acres of land, but for greater certainty in this behalf an attested copy of said patent is to be filed as a part of this answer. They state that on or about the — day of ——, ——, the said George Johnson took possession of said tract of land and placed tenants thereon, and that he has been in possession of the same tract by himself and his venders from that day to this date.

That a patent issued to Marshall, Shore, and McConnico, as is stated in the bill and answer of the defendant Johnson, which is elder in date than the patent granted to said George Johnson, the latter being dated on the 2d day of June, 1800, and the former on the 16th of October, 1788; that said Johnson became (as they are advised to charge) uneasy about said elder grant, and on the — day of ——, ——, purchased all the right and title of Christopher McConnico for the sum of $——, and obtained his deed therefor, which is, or will be, filed in this cause as an exhibit, and by said purchase consolidated the said claim with his own, so as to secure himself, so far at least as McConnico's undivided interest could do so; that on the 2d day of April, 1819, the said George Johnson duly and
316 legally made, executed, and delivered a power of attorney to me, Henry Halbert, authorizing and empowering him to sell and convey any and all of said Johnson's land lying in the county of Greenup aforesaid, and the said lands, being in said county, the said Halbert, as attorney for said Johnson, on the 29th day of October, 1819, by deed, conveyed the right, title, and interest of said Geo. Johnson to John Trimble, for a valuable consideration, viz., for $600, and the said John Trimble afterwards, for the sum of $600, conveyed the same interest which he acquired under said deed to your respondents, by virtue of which sales they are entitled to hold and defend such title as said Johnson formerly held and defended.

They show that he has abandoned the defence of the suit, and pays no further attention to it, and that by reason of his negligence the title will be sacrificed, and their possession and improvements put at hazard; they charge that they are now in possession of the land under the right of said Johnson, as united with his purchase from McConnico, and that the possession which they hold is regularly deduced from the original possession of said George, as before stated, and is, in fact, the same possession continued and
317 regularly passed down to them from hand to hand by delivery.

Wherefore they are advised to charge that they hold a possession of twenty full years before the date of the complainant's subpœna in chancery, and they plead that fact, and the law of limitations, to the complainant's equity, and on the final hearing will rely upon the same as if it was pleaded in due form.

They charge that one David Trimble caused an execution to be issued in his name upon a judgment of the Montgomery circuit court against said George Johnson, and caused the same to be legally levied on said tracts of land, and thereupon the sheriff of Greenup made a legal sale of said Johnson's rights and title therein, and

John Trimble, being the highest bidder, became the purchaser for the sum of $8——, and afterwards transferred his purchase to your respondents; but for greater certainty in this behalf they will file attested copies of said deeds and the power of attorney aforesaid, and the transfers and conveyances herein mentioned, all of which they pray may be made a part of this answer.

They charge that the compl't's entry and those which he calls for are vague and void, and call for objects which were not either
318 notorious and well known at their dates, nor were they so described as that they could have been found by using reasonable diligence in searching for them. That the surveys are not made agreeably to law and location, but were fraudulently made contrary thereto, and so as to interfere materially, as the complainant pretends, with your respondent's lands, but they are advised to say that said survey, when properly run out, will not cover or include the lands which they hold, as before stated and described, and that of course the patent will not cover the same.

They do not know that any of the deeds of conveyance under which the complainants makes title were ever executed or that the power of att'y were duly and legally made.

Wherefore they call for proof of said powers of attorney and deeds of conveyance, and when the same deeds are filed will except thereto and to the authentications. They charge that the complainants had no legal or equitable title to the tract of land in the bill mentioned at any time prior to the — day of ——, 1816, and they charge that they were possessed of said lands for the space of more than seven years before the complainant had title, and they
319 rely upon and plead the law of limitations in that behalf made, and will on the final hearing urge the same as a bar to the equity of the complainant.

They have been informed that some of the complainants' vendors are aliens, incapable of acquiring or holding lands in this country, but as they cannot name which, they are advised to charge that all the complainant's vendors were aliens at and before the dates of the deeds, respectively made to them, and your respondents plead the said alienage in bar to the complainants' bill, and the equity therein contained.

They deny all and every part of the bill, and every fact contained therein, which is not here specially replied to, and pray that the complainants' bill may be dismissed with costs, &c.

And they will ever pray, &c.

Exceptions of Davis & Dawson. July 31st, 1820.

The defendants, Davis and Dawson, except to the depositions James H. Gholson, Jacob Sandusky, James Sandusky, James Norton, Gen'l John Payne, Robert Pogue, and Sam'l Strode, for the following reasons, to wit:

320 1st. There is no notice given to George Johnson, under whom they claim, of the time and place of taking the aforesaid depositions.

2nd. Johnson is a resident of this State, and was personally served

with the subpœna in chancery, and ought therefore to have been served personally with notices of the times and places of taking said depositions, which has not been done, and the newspaper notices filed in the cause are not such as he is bound to notice or allowed to.

3d. Notice to the attorney of Johnson is not legal notice, nor is the advertisement legal notice.

They also accept to the title papers filed in this cause to show deductions of title in the complainants.

1st. Because none of them are duly authenticated of record.

2nd. Because none of them are proven as unrecorded papers.

3rd. Because the powers of attorney (by virtue of which two of the deeds were made) are not duly and legally made and authenticated, nor are they proven as unrecorded papers.

D. TRIMBLE,
Att'y for Davis and Dawson.

321 October 30th, 1783, Richard Graham enters 80,406¾ acres of land on a Treasury warrant No. 19207, lying on the waters of Ohio, beginning at the head of a right-hand fork of Tygart's creek, that empties into the said creek about four miles from the mouth thereof, and running thence S. 45 W. 12 miles, then S. 45 E. from the ends of this line of 12 miles for quantity.

A copy.
Teste: ROB. PARKER, *S. F. C.*

Notice to Rob't Hughes, Agent, &c. September 21st, 1820.

Robert Hughes, agent for the heirs of James Hughes and others, in a suit in chancery, depending in the Greenup circuit court against Johnson, &c.

Take notice that on the first Saturday in October next, and on the following Monday and Tuesday, we shall attend at the house of Wm. Evans, at Little Sandy Salt Works, Greenup county, and will then and there take the depositions of Jas. Norton and others, to be read as evidence in the said suit in chancery now depending in the Greenup circuit court, wherein the heirs of James Hughes are complainants and Geo. Johnson and others are defendants, at which time and place you may attend.

Sept. 21st, 1820. GEORGE N. DAVIS.
NATHANIEL DAWSON.

322 Endorsed as follows:

I acknowledge service of the within notice for myself, but protest against it as agent for the heirs of James Hughes.

2nd Oct., 1820. ROB'T HUGHES.

Deposition James Norton. October 11th, 1820.

The deposition of JAMES NORTON, being of lawful age, taken at the house of Wm. Evans, on the 7th day of October, 1820, agreeably to notice, to be read in evidence in a suit in chancery depending in the

Greenup circuit court, wherein Rob't Hughes, agent for the heirs of James Hughes and others, are complainants and Geo. Johnson, &c., defendants, being first duly sworn, deposeth and saith, by way of question:

Question by def'ts. How long had George Johnson possession of the Ridgely claim and a claim in the name of Marshall, Shore and McConnico, which claims cover the premises now occupied by Geo. Davis and N. Dawson, which is a furnace, salt well, &c.; also those occupied by James Ward, Sen'r; also those occupied by Wm. Martin, formerly occupied by Peter Kouns?

Answer. From the latter part of December, seventeen hun-
323 dred and ninety-nine, Peter Kouns commenced the occupation of the above-recited premises, and he thinks some time in the summer, after Kouns took protection under the claim or claims of Geo. Johnson; and further this deponent saith not.

his
JAMES X NORTON.
mark.

Endorsed as follows:

GREENUP COUNTY, *set:*

This is to certify that the foregoing was duly taken, subscribed, and sworn to before me, a justice of the peace for said county.

Given under my hand, this 7th day of October, 1819.

THOMSON WARD.

Justice's fees for taking this deposition, $1.00.

THOMSON WARD.

Power of Attorney, J. Trimble to D. Trimble. October 23d, 1820.

Know all men by these presents, that I, John Trimble, of the county of Montgomery, and State of Kentucky, have selected, nominated, and appointed, and do by these presents constitute, nominate, and appoint David Trimble my attorney-in fact for me, and in my name to do, perform, and transact all and every kind
324 of business in which I am interested or concerned, to buy and sell personally or real property for me, attend all my suits which I am plaintiff *vs.* defendants, and execute bonds and other writings for me and in my name when necessary, or for my advantage to the same, in or out of courts of justices, and generally to do all and every act which I could do were I personally present, and any act done by my said attorney in virtue of this general power of attorney shall be as valid and binding on me as if done by myself personally. And I do hereby ratify, allow, and will confirm whatsoever my said attorney may do in this behalf for me and in my name.

In testimony whereof, I have hereunto set my hand and affixed my seal, this 2d day of July, 1820.

JOHN TRIMBLE. [SEAL.]

MONTGOMERY COUNTY COURT, CLERK'S OFFICE, *July 5th*, 1820.

I, Micijah Harrison, clerk of the court of the county aforesaid, do hereby certify that this power of attorney from John Trimble to David Trimble was this day produced to me, in the office aforesaid, and acknowledged by the said John Trimble to be his act and deed, hand and seal, and the same thereupon is duly entered of record.

Test: M. HARRISON, *Clerk.*

325 STATE OF KENTUCKY, *Greenup County,* } *sct:*

I do hereby certify that this power of attorney from John Trimble to David Trimble, together with a certificate thereon endorsed from the clerk of Montgomery county court, was produced to me in my office, as clerk of the county court of said county of Greenup, on the 23d day of October, 1820, and by virtue of said certificate, said power of attorney and certificate have been duly recorded in my office.

Attest: JOHN HOCKADAY, *C. G. C. C.*

A copy.

Teste: JOHN HOCKADAY, *C. G. C. C.*

Copy Rule vs. Compl'ts, to April, 1825.

GREENUP COUNTY, *sct:*

Greenup Circuit Court, Chancery Term, 1824, September.

JAMES HUGHES' HEIRS, Comp'l'ts,
vs.
SHORES' HEIRS, &c., Def'ts. } In Chancery.

SEPTEMBER 30TH, 1824.

226 This day came the parties aforesaid, by their counsel, and the death of Joshua Humphreys, *prochinamy* for the infant heirs of Jas. Hughes, dec'd, being suggested to the court, and it being also suggested that since the commencement of this suit and the death of the said Jas. Hughes, Rob't Hughes, and Ann C. Hughes, part of the heirs of the said James Hughes, dec'd, have become of age, and that the said Ann C. Hughes has intermarried with James Tingle, it is, on motion of the said James Tingle, by his counsel, ordered that he be made a co-complainant in this suit with the other complainants herein, and thereupon the defendants moved the court for an abatement upon the above suggestion, so far as relates to the infants, who sued by the said Joshua Humphreys, as their next friend, and who had not yet attained their full age; which motion was overruled, and thereupon it is ruled that such of the complainants as are of full age do take the necessary steps to bring all proper parties before the court on or before the 3rd day of the next April term, or that on failure so to do this suit shall be dismissed for the want of prosecution.

A Copy.

Teste: JOHN HOCKADAY, *C. G. C. C.*

Bill of Exceptions. July 8th, 1825.

HUGHES' HEIRS
vs.
SHORE'S HEIRS and JOHNSON. } In Chancery.

327 Be it remembered that upon the calling of this cause for trial the complainant introduced and read copies of the entry in the name of Chas. Fleming for 26,373 acres, in the bill mentioned, in the words and figures following, to wit: (Here insert it.) They then introduced and read the patent from the Commonwealth of Virginia, for 16,191 acres of land, being the land in controversy, in the words and figures following, to wit: (Here insert it.) They then introduced and read the will of Chas. Fleming, in the following words: (Here insert it.) He then introduced and offered to read a deed of conveyance from the said Wm. Fleming, John Bernard, Junior, and Richard Bernard, trustees named in said will, to John Bryan, which, with the certificates thereon endorsed, is in the words and figures following, to wit: (Here insert it.) But to the reading of this deed the defendants, by their counsel, objected, because the certificate and seal of the mayor of Philadelphia is not sufficient to authorize it to be read, and because the same could not be read as a recorded deed, not having been so recorded within the time prescribed by law; which objection was sustained by the court,
328 and the deed rejected; and because by rejecting this deed, the complainants' claim of title was broken, and they could not further progress with their evidence, the court rendered a decree dismissing the complainants' bill with costs; to all which opinions of the court, the complainants', by their counsel, except, and pray that this their bill of exceptions may be signed and sealed by the court and made a part of the record, which is done accordingly.

NOTE.—The complainants, by their counsel, refused to suffer a nonsuit, or to abate their suit.

W. P. ROPER. [SEAL.]

Memo. for Subpœna.

Issue a subpœna in chancery, James Hughes against Jane Grayson Shore, Elizabeth Smith Shore, and Mary Louisa Shore, heirs and representatives of Thos. Shore, dec'd, and George Johnson, to July term.

J. HUGHES.

Notice to Take Depositions, April 23d.

JAMES HUGHES' HEIRS
vs.
GEORGE JOHNSON, and THE HEIRS OF THOS. SHORE, dec'd, to wit, Elizabeth Smith Shore, Jane Grayson Shore, and Mary Louisa Shore.

In a suit pending in the Greenup Cir. Court.

329 The defendants' agents and attorneys are notified that depositions will be taken, to be read in evidence in the above suit,

at the time and places hereinafter expressed, to wit: On Monday, the 5th day of April next, between the hours of six o'clock in the morning and six in the evening, at the house of Jas. Sandusky, in the county of Bourbon, adjourning from day to day until completed; on Monday, the 12th day of April, between the same hours, and to continue from day to day as aforesaid, at the house of Jacob Sandusky, in the county of Woodford; on Wednesday, the 14th day of April, between the same hours, continuing from day to day as aforesaid, at the house of John Smith, also in Woodford county; and on Monday, the 26th day of April, between the same hours, adjourning from day to day as aforesaid, at the office of John M. McConnell, Esq., in the town of Greens-burg.

JOSH. HUMPHREYS.

Received of Joshua Humphreys, adm'r of the estate of James Hughes, the sum of five dollars and fifty cents for publishing for ten weeks in the Kentucky Gazette the attached notification to the heirs of Thos. Shore and Geo. Johnson for taking depositions, as therein stated.

Lexington, 23d April.

JOSHUA NORVELL & CO.

330 *Memo. of Papers Used.*

14 entries.
Chas. Fleming's grant.
Lowry and Warring to Hughes (deed).
Two surveys of Fishback and Berry for 1,102½ acres each.
E. O. Bryan's survey of 3,561½ acres.
Minor Winn's " " 7,926 "
Wm. Fitzhugh's " " 12,000 "
Evan Griffith's " " 2,051¾ "
Will. Fleming & *al.* to Bryan (deed).
Sam'l Sackett, trustee, to Sam'l Beebee (quit-claim deed).
Beebee, power of attorney, to Mills.
" by his " " Hughes, deed.
" by Mills, his " " Caldwell, "
A. Caldwell to Mills, deed.
Mills to Hughes, "
Chas. Fleming's will.
John Bryan & wife to Sam'l Sackett, deed.
Survey made by John Young.
Original deed trust, Lawrence to Corp, Douglass and Titford.
Original deed, Sam'l Sackett to Goodwin & *als.*, $18.52½.

List of Papers filed by Jas. Hughes in the suit in Chancery, Hughes against Johnson, &c., and the Ejectments. Doe on Dem't of Hughes against Howe and others.

331 One original patent to Chas. Fleming for 16,191 acres.
Copy of the will of Chas. Fleming.
Original deed, Fleming & Bernards to John Bryan, for 54,191 acres.

Original deed, John Bryan & wife to Sam'l Sackett, for 35,456 acres.

Deed of trust, Sam'l Sackett to Goodwin, Ramsey, and Douglas, original.

Deed, Nathaniel Lawrence to Corp, Douglass, and Titford.

Original deed, Corp & Titford to Sam'l Beebee.

Original power of att'y, Beebee to Peter Mills.

Original deed, Beebee by Mills, his attorney-in-fact, to Hughes, for 16,191 acres.

Beebee by Miller, his att'y, to Alex'r Caldwell.

Copy of deed for 18,000 acres.

Original deed from Alexander Caldwell to Peter Mills for an undivided moiety of 1,800 acres.

Original deed, Mills to Hughes for said moiety.

The plaintiffs in further support of said original deed offered to prove by parol testimony that there was recorded in the deed book of the Kentucky court of appeals clerk's office, containing deeds recorded in 1816, a copy of a deed identical in terms with said paper, purporting to be the original of said deed; to the admission of
332 which proof the defendants objected, and the court sustained their objection and refused to permit said proof to be made.

To which ruling of the court the plaintiffs at the time excepted and still except.

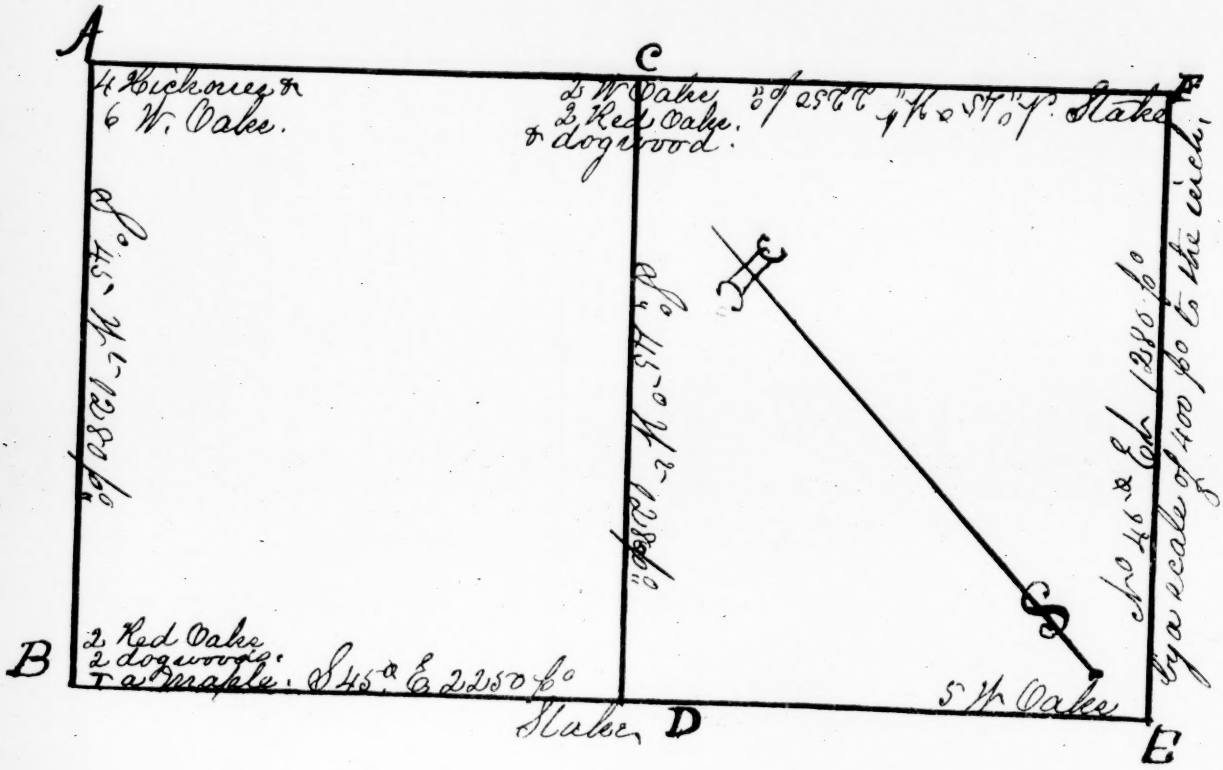
Plaintiffs thereupon in further support of the competency of said original deed offered the following certified copies from the clerk's office of the Greenup county court:

The division and plat made by the commissioners October 18th, 1810, which is in words and figures as follows:

GREENUP COUNTY, *sct.*:

We, William Lowery and Thomas T. G. Warring, two of the commissioners appointed by the court of the said county, under the act entitled an act to reduce into one the several acts for the conveyance and division of lands, having been applied to by James Hughes, a citizen of the Commonwealth of Kentucky, who produced to us a deed bearing date the 5th day of November, 1808, from Peter Mills, of Zanesville, in the State of Ohio, for one undivided moiety of 18,000 acres of land in the county granted by patent from the then Governor of Virginia to Chas. Fleming on the 21st day of April, 1792, conveyed by the said Fleming to Jno. Bryan, by Jno. Bryan to Samuel Sackett, of the city of New
333 York, by Samuel Sackett to his trustees, by the trustees to Samuel Beebee, and by the said Samuel Beebee to Alexander Caldwell, of Brooke City, Virginia, and one of the undivided moiety thereof by the said Alexander Caldwell to the said Peter Mills, and required that a division of the said 18,000 acres of land might be made between the said Alexander Caldwell, a citizen of the Commonwealth of Ohio, and himself and his proportion, to wit, nine thousand acres, laid off to him by metes and bounds and conveyed to him agreeably to the direction of the before-recited act. We have proceeded to divide and allot the same in manner following, to wit:

(Page 334.)


A
C
F
4 Hickories &
6 W. Oaks.
2 W. Oaks
2 Red Oaks.
& dogwood.
Stake
N. 45° W. 1280 f°
N. 45° W. 1280 f°
N. 46° E. 1280 f°
By a scale of 400 f° to the inch.
B
2 Red Oaks
2 dogwoods
& a Maple.
S. 45° E. 2250 f°
5 W. Oaks
Stake
D
E

The said James Hughes produced to us the copies of paper filed in Mason circuit court in a suit, Cary L. Clarke *ag'st* Conkling, &c., herewith returned, marked "A," from which it appeared that 8,334 acres, part of the said 18,000 acres at the southeast end, was vested in the said Cary L. Clarke, both by a previous sale and a decree in the said suit. We therefore divided the said tract of 18,000 acres of land, as will appear by the following plat, into two equal parts:

(Here follows diagram, marked page 334.)

A, B, E, F represent the whole tract, A, B, C, D 900 acres at the the northwest end, which we have allotted and conveyed to the said James Hughes by the following boundaries, to wit: Beginning at five white oaks and a hickory, beginning corner of the original survey in Rezin Virgin's meadows on Town creek, thence S. 45° E. 1,125 poles to two white oaks, two red oaks, and a dogwood, a poplar, marked W. L., a W. oak I. H., and a gum T. W. on a hill, near Cane creek; thence S. 45° west 1,280 poles to a stake in the old line; thence north 45° west 1,125 poles to two red oaks, two dogwoods, and a maple; thence north 45° east 1,280 poles to the beginning.

Given under our hands, this 18th day of October, 1810.

WILLIAM LOWERY.
THOS. T. G. WARRING.

335 STATE OF KENTUCKY, *Greenup County,* } *sct:*

I do hereby certify that this division of land was produced to me, as clerk to the county court of said county, on the 18th day of October, 1810, by the commissioners therein named, and the same has been duly recorded in my office.

Attest: JOHN HOCKADAY, *C. G. C.*

STATE OF KENTUCKY, *County of Greenup,* } *sct:*

I, George A. Corum, clerk of the county court for the county of Greenup, in the State aforesaid, do certify that the foregoing division and plat of land made by William Lowery and Thomas T. G. Warring, commissioners, to James Hughes & Co., are truly copied from the records of my said office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, this 2nd day of May, 1878.

[SEAL.] GEO. A. CORUM, *Clk.*

STATE OF KENTUCKY, *County of Greenup,* } *sct:*

I, A. L. Ried, presiding and sole judge of the county court
336 for the county of Greenup, in the State aforesaid, do certify that George A. Corum, whose genuine signature is affixed to the foregoing certificate, was, on the day it bears date, clerk of said

court, and that his said certificate and attestation are in due form of law, and made by the proper officer.

Given under my hand, this 2nd day of May, 1878.

A. L. RIED, *J. G. C. C.*

STATE OF KENTUCKY, }
County of Greenup, } *sct:*

I, George A. Corum, clerk of the county court for the county of Greenup, in the State aforesaid, do certify that A. L. Reid, whose genuine signature is affixed to the foregoing certificate, was, on the day it bears date, presiding and sole judge of the Greenup county court, and that his said certificate and attestation are in due form of law.

Given under my hand, this 2d day of May, 1878.

GEO. A. CORUM, *Cl'k.*

Also, the deed by commissioners to James Hughes, dated October 18th, 1810, which deed is in the words and figures, as follows:

337 This indenture, made this 18th day of October, 1810, between William Lowery and Thomas T. G. Warring, two of the commissioners appointed by the city court of Greenup couty, in pursuance of the act of Assembly entitled an act to reduce into one the several acts for the conveyance and division of lands, of the one part, and James Hughes, of Mason city, Kentucky, of the other part, witnesseth: That the said Wm. Lowery and Thomas T. G. Warring, commissioners as aforesaid, having, in pursuance of the before-recited law, divided a tract of 18,000 acres of land between the said James Hughes and Alexander Caldwell, of the State of Ohio, have, in pursuance of the directions of the said act, granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said James Hughes, his heirs and assigns, nine thousand acres of land, part of 18,000 acres granted by patent from the Governor of Virginia to Chas. Fleming on the 21st day of April, 1792, conveyed by Chas. Fleming to Jno. Bryan, by Jno. Bryan to Samuel Sackett, of the city of New York; by Samuel Sackett to his trustees, by the trustee to Samuel Beebee, by Samuel Beebee to Alexander Caldwell, one moiety thereof by Alexander Caldwell to Peter Mills, and the said moiety by Peter Mills to the said James Hughes,

338 by the following boundary, to wit: Beginning at 5 w. oaks and a hickory, beginning corner of the original survey, standing in Rezin Virgin's meadow, on Town creek; thence south 45° east 1,125 poles to two white oaks, two red oaks, and a dogwood, a poplar marked W. L., a white oak, I. H., and a gum, T. W., on a hill near Cane creek; thence south 45 west 1,280 poles to a stake in the original line; thence north 45° west 1,125 poles to two red oaks, two dogwoods, and a maple; thence north 45 east 1,280 poles to the beginning. With all the right, title, property, claim, and demand of the said Alexander Caldwell, his heirs and assigns, of, in, and to the same, to have and to hold the said tract of land, with the appurtenances, to the said James Hughes, his heirs and assigns, to his and their only proper use and behoof forever.

In testimony whereof, the said commissioners have set their hands and affixed their seals the day and date first before written.

WILLIAM LOWERY. [SEAL.]
THOS. T. G. WARRING. [SEAL.]

Signed, sealed, and delivered in presence of—

The words "The State of" in the first page being first in-
339 terlined, and the word "county" crossed.

STATE OF KENTUCKY, *Greenup County,* } *set:*

I do hereby certify that this indenture was produced to me, as clerk to the court of said county, on the 18th day of October, 1810, and acknowledged by William Lowery and Thomas T. G. Warring to be their act and deed, and the same has been duly recorded in my office.

Attest: JOHN HOCKADAY.

STATE OF KENTUCKY, *County of Greenup,* } *set:*

I, George A. Corum, clerk of the county court for the county of Greenup, in the State aforesaid, do certify that the foregoing deed from William Lowery and Thomas T. G. Warring, commissioners, to James Hughes, is truly copied from the records of my said office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, this 2d day of May, 1878.

[SEAL.] GEO. A. CORUM, *Clk.*

STATE OF KENTUCKY, *County of Greenup,* } *set:*

340 I, A. L. Reid, presiding and sole judge of the county court for the county of Greenup, and State aforesaid, do certify that George A. Corum, whose genuine signature is affixed to the foregoing certificate, was, on the day it bears date, clerk of said court, and that his said certificate and attestation are in due form of law, and made by the proper officer.

Given under my hand, this 2d day of May, 1878.

A. L. REID, *J. G. C. C.*

STATE OF KENTUCKY, *County of Greenup,* } *set:*

I, George A. Corum, clerk of the county court for the county of Greenup, and State aforesaid, do certify that A. L. Reid, whose genuine signature is affixed to the foregoing certificate, was, on the day it bears date, presiding and sole judge of the Greenup county court, and that his said certificate and attestation are in due form of law.

Given under my hand and official seal, this 2d day of May, 1878.

[SEAL.] GEO. A. CORUM, *Clk.*

Also a deed from the sheriff of Greenup county to Wm.
341 McConnell, dated August 14th, 1820, which is in words and figures as follows:

This indenture made and entered into this fourteenth day of August, in the year of our Lord one thousand eight hundred and twenty, between William Ward, deputy sheriff, for John Poague, sheriff of Greenup county, of the one part, and William McConnell, of the county of Fayette, and Commonwealth of Kentucky, of the other part, witnesseth: Whereas on the 27th day of April, 1820, a writ of *fieri facias* issued from the office of the Fayette circuit court, directed to the sheriff of Greenup county, against Ann C., Robert, Elizabeth, James, Patsey, and Sarah H. Hughes, heirs of James Hughes, dec'd, in favor of said William McConnell, which was delivered into the hands of said William Ward, deputy sheriff, as aforesaid, on the 16th day of May, 1820, whereby he was commanded to make of the estate of the said heirs one thousand dollar debt with interest on two hundred and fifty dollars thereof, from the first day of June, 1808, until paid; on two hundred and fifty dollars thereof from the first day of October, 1808, until paid, and on the remaining five hundred dollars from the 25th day of April, 1809,
342 until paid, and also $8.15 cents cost, and $7.53 cents, the cost of a former suit, amounting in all to the sum of $1,749, including sheriff's commission, which was levied on the estate of the said heirs by the said Ward, deputy as aforesaid, and on the twelfth day of June, eighteen hundred and twenty-one, undivided third part of the locator interest (one half) in a tract of land of ten thousand acres, on Little Sandy, patented to Edmund Logword, at the house of Mathew Stewart, on the premises, and one undivided eighth part of a tract of one thousand acres of land, at the mouth of Little Sandy, patented to John Craig at the court-house door, on the premises, were sold to the highest bidder on a credit of twelve months, and the said William McConnell being the highest bidder became the purchaser of the first-named tract for the sum of two hundred dollars, and of the last mentioned for the sum of one hundred and fifty dollars. And on the fourteenth day of the same month and same year, at the house of James Ward, Sen'r, on the premises, a tract of sixteen thousand one hundred and ninety-one acres of land on the waters of Little Sandy and Tygart's creek, patented to Charles Fleming, was sold to the highest bidder on a credit of twelve months,
343 of which the said William McConnel became the purchaser for the sum of eight hundred and fifty-one dollars. And on the sixth of July in the same year, the said writ of *fieri facias* being still unsatisfied, nine thousand acres of land, part of a tract of eighteen thousand acres on Little Sandy river, patented to Chas. Fleming, was exposed to sale to the highest bidder, on a credit of twelve months, at Ward's Mill, on the premises, and the said William McConnell became the purchaser of the whole thereof, except four hundred and fifty acres, to be taken off the east end, for the balance due on the said writ [of] *fieri facias*, being the sum of five hundred and forty-eight dollars, all of which sum have been endorsed as credits

on the back of said writ of *fieri facias*, and the same returned satisfied by the said William Ward, deputy as aforesaid.

Now, therefore, this indenture witnesseth, that the said William Ward, deputy sheriff, for John Poague, sheriff of Greenup county, for and in consideration of the premises, and for the further consideration of one dollar to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof he doth hereby acknowledge, and thereof acquit and discharge the said Wil-
344 liam McConnell, hath granted, bargained, sold, aliened, enfeoffed, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, convey, and confirm, unto the said William McConnell, and to his heirs and assigns forever, all the tracts, pieces, or parcels of land hereinafter described, to wit: one undivided third part of the locator's interest (one-half) of a tract of land of ten thousand acres on Little Sandy river, in Greenup county, entered and surveyed for and patented to Edmund Logwood; one undivided eighth part of a tract of one thousand acres of land at the mouth of Little Sandy, in the said county of Greenup, entered and surveyed for and patented to John Craig; all of a tract of sixteen thousand one hundred and ninety-one acres of land on the waters of Little Sandy river and Tygart's creek, in the said county of Greenup, entered and surveyed for and patented to Charles Fleming; and all of nine thousand acres of land, part of a tract of eighteen thousand acres on Little Sandy, in the said county of Greenup, entered, surveyed for, and patented [to] Charles Fleming, except four hundred and fifty acres, to be taken off the east end thereof; all of which tracts of land were regularly conveyed to the said James Hughes, deceased, and from him, at his decease, descended
345 to the said Ann C. Robert, Elizabeth, James, Patsey, and Sarah H., his heirs-at-law, together with all and singular the rights, members, hereditaments, and appurtenances to the same belonging or in anywise appertaining; and all the estate, right, title, claim, interest, and demand of the said heirs-at-law of the said James Hughes, deceased, of, in and to the same, and of, in and to every part and parcel thereof; to have and hold the said several tracts, pieces or parcels of land unto him, the said William McConnell, and to his heirs and assigns, to his and their only proper use, benefit, and behoof forever.

In testimony whereof, the said William Ward, deputy sheriff as aforesaid, hath hereunto set his hand and affixed his seal, the day and year first aforesaid.

WILL. WARD, [L. S.]
Deputy Sh'ff.
For JOHN POAGUE,
Sheriff of Greenup County.

Signed, sealed, and delivered in presence of ——. The words "April, 1809," between third and fourth line, second page; the words "a tract of," between third and fourth lines, third page; the word "thousand," between twelfth and thirteenth lines, third page; and words "patented to Chas. Fleming," between fourteenth and —— lines,

third page; and the word "June," between the tenth and
346 eleventh lines, second page, interlined before sealed.
Signed, sealed, and delivered in presence of—
JOHN HOCKADAY.
J. R. CHITWOOD.

STATE OF KENTUCKY, }
County of Greenup. } *sct.*

I do hereby certify that this indenture from William Ward, deputy sheriff, for John Poague, sheriff of Greenup county, to William McConnell, was produced to me in my office, as clerk of the county court of said county, on the 15th day of August, 1820, and acknowledged by the said William Ward, as deputy sheriff as aforesaid, to be his act and deed, and the same has been duly recorded.
Attest: JOHN HOCKADAY.

STATE OF KENTUCKY, }
County of Greenup. } *sct.*

I, George A. Corum, clerk of the county court for the county and State aforesaid, do certify that the foregoing deed from the sheriff to William McConnell is truly copied from the records of my said office.

In testimony whereof, I have hereto subscribed my name
347 and affixed my official seal, this 25th day of November, 1817.
[SEAL.] GEO. A. CORUM, *Ctk.*

STATE OF KENTUCKY, }
County of Greenup, } *sct:*

I, W. J. Worthington, presiding and sole judge of the county court for the county and State aforesaid, do certify that George A. Corum, whose genuine signature is affixed to the foregoing certificate, was, on the day it bears date, clerk of said court, and that his attestation is in due form of law and made by the proper officer.
Given under my hand, this 25th day of November, A. D. 1878.
W. J. WORTHINGTON, *J. G. C. C.*

STATE OF KENTUCKY, }
County of Greenup, } *sct:*

I, George A. Corum, clerk of the county court for the county and State aforesaid, certify that W. J. Worthington, whose genuine signature is affixed to the foregoing certificate, was, on the day it bears date, presiding and sole judge of the Greenup county court, and that his said certificate and attestation are in due form of law.
Given under my hand and official seal, this 25th day of November, 1878.
[SEAL.] GEO. A. CORUM, *Clerk.*

348 Also a deed from Wm. McConnell to James Howe, dated January 15th, 1822; which is in words and figures as follows

This indenture, made this 15th day of January, in the year of our

Lord one thousand eight hundred and twenty-two, between William McConnell, by John McConnell, his att'y-in-fact, of the one part, and James Howe, of the county of Greenup and Commonwealth of Kentucky, of the other part: Witnesseth, that the said William McConnell, for and in consideration of the sum of one hundred dollars, current money of Kentucky, to him in hand paid, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, and by these presents doth grant, bargain, sell, and confirm unto the said James Howe, his heirs and assigns, all that tract or parcel of land situate and being in the county of Greenup, on the waters of Little Sandy, and bounded as follows, to wit: Being all that part of the tract of 18,000 purchased by the said William at sheriff's S., as the property of the heirs of James Hughes, dec'd, which lies above Wornack's line, and on the east side of Little Sandy, except such lands in said tract, on the said east side of Little Sandy
349 as were sold by the said James Hughes, or his agent, in his lifetime, of which the place sold to Garret Hassin is —— containing ———, together with all and singular the premises thereunto belonging or in anywise appertaining. To have and to hold the land hereby conveyed, with the appurtenances, unto the said James Howe, his heirs — assigns, forever, and the said William McConnell, for himself, his heirs, executors, and administrators, the aforesaid tract of land and premises unto the said James Howe, his heirs or assigns, against the claim of him, the said William McConnell, his heirs and assigns, but against the claim of no other person whatsoever, it being understood that the right of the said William alone is hereby sold, doth and will warrant and forever defend by these presents.

In witness whereof, the said William McConnell hath hereunto set his hand and seal, the day and date first above written.

WILLIAM McCONNELL, [L. S.]
By his att'y-in-fact, JAS. M. McCONNELL.

Signed, sealed, and delivered in presence of—
GEO. W. DAVIS.
JEHU RICE.

STATE OF KENTUCKY, *Greenup County*, } *set:*

350 I, John Hockaday, clerk of the county court for the county aforesaid, do hereby certify that this indenture from William McConnell, by John M. McConnell, his attorney-in-fact, to James Howe, was produced to me, in my office, on the 13th of May, 1822, and acknowledged by the said John M. McConnell, as attorney as aforesaid, to be his act and deed, and the same has been duly recorded.

Attest: JOHN HOCKADAY.
A Copy.
Attest: GEO. A. CORUM, *C. G. C. C.*,
By A. M. DAVIDSON, *D. C.*

STATE OF KENTUCKY, } *sct:*
County of Greenup, }

I, George A. Corum, clerk of the county court for the county and State aforesaid, do certify that the foregoing deed from William McConnell to James Howe is truly copied from the records of my said office.

In testimony whereof, I have hereto subscribed my name and affixed my official seal, this 25th day of November, 1878.

[L. S.] GEO. A. CORUM, *Clk.*

STATE OF KENTUCKY, } *sct:*
County of Greenup, }

351 I, W. J. Worthington, presiding and sole judge of the county court for the county and State aforesaid, certify that George A. Corum, whose genuine signature is affixed to the foregoing certificate, was, at the time it bears date, clerk of said court, and that his attestation is in due form of law and by the proper officer, and his official acts are entitled to full credit.

Given under my hand, this 25th day of November, 1878.

W. J. WORTHINGTON, *J. G. C. C.*

Also a deed from Howe's heirs to Alexander Campbell, dated December 13th, 1847, which is in words and figures, as follows:

This indenture, made and entered into this thirteenth day of December, one thousand eight hundred and forty-seven, between Jno. T. Montgomery and Mary I. Montgomery, his wife, late Mary I. Howe; Henry Stark and Adilaide Stark, his wife, late Adilaide Howe; Daniel L. Clifton and Elizabeth Clifton, his wife, late Elizabeth Howe; Martha Ann Howe, Rebecca Howe, and James Howe, of the county of Greenup, and State of Kentucky, of the first
352 part, and Alexander Campbell of the same county and State, of the second part witnesseth: That the parties of the first part, for and in consideration of one thousand four hundred and fifty dollars to them in hand paid, the receipt of which is hereby acknowledged, have given, granted, bargained, and sold, and by these presents doth give, grant, bargain, and sell to the said parties of the second part, his heirs and assigns, all of our and each of our undivided interest, being one-ninth part each, that is to say, the said John Y. Montgomery and wife, one-ninth; Henry Stark and wife, one-ninth; Daniel L. Clifton and wife, one ninth; and Martha Ann, Rebecca, and James Howe, each one-ninth of, in and to all that part of Charles Fleming's eighteen thousand acres, which was sold at sheriff's sale as the property of the heirs of James Hughes, deceased, and purchased by William McConnell and by him conveyed to James Howe (under whom the parties of the first part claim) by deed of record in the clerk's office of the Greenup county court in deed book "C," page seventy-six, which lies on the east side of Little Sandy river, in said county, and in the county of Carter, saving and reserving however out of this conveyance the following tracts of

land sold and bequeath- by said James Howe in his lifetime,
353 to wit:

Five hundred acres to Martha Ann Howe, five hundred to Mary Montgomery, five hundred to John Howe, three hundred and thirty to Champness, Geo., one hundred acres now owned by the Greenup Furnace, three hundred acres to George Howe, and one hundred acres to Daniel Howe. To have and to hold the lands hereby conveyed, with the appurtenannes, being six-ninths undivided, and the said party of the — part, his heirs and assigns forever; and the parties of the first covenant to and with the party of the second part that they are entitled to one-ninth each, as hereinbefore set forth, of, in, to said land, and that they will warrant and forever defend the title to the lands herein conveyed, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the claim or claims of all and every person or persons claiming the same by, through, or under them, or either of them, and against the claim or claims of all persons claiming the same by, through, or under James Howe, deceased, saving and excepting these veral tracts hereinbefore saved and excepted.

In testimony whereof, the parties of the first part have
354 hereunto subscribed their names and affixed their seals, the day and year above written. The words "and in the county of Carter" interlined before signing.

JOHN Y. MONTGOMERY. [SEAL.]
MARY I. MONTGOMERY. [SEAL.]
HENRY STARK. [SEAL.]
ADELAIDE STARK. [SEAL.]
DANIEL L. CLIFTON. [SEAL.]
ELIZABETH J. CLIFTON. [SEAL.]
MARTHA A. HOWE. [SEAL.]
JAMES A. HOWE. [SEAL.]
REBECCA E. HOWE. [SEAL.]

Witnesses:

JESSEE POYNTER.
WILLIAM KOUNS.

KENTUCKY, }
Greenup County, } *sct:*

We, William Kouns and Jesse Poynton, two of the commonwealth's justices of the peace for said county, do certify that Mary Montgomery, the wife of the within-named John Y. Montgomery, Adelaide Stark, wife of Henry Stark, and Elizabeth Clifton, wife of Daniel L. Clifton, this day personally appeared before us, who being examined privately and apart from their said husbands, declare that they did freely and willingly seal and deliver the said writing, and wish not to retract it, and acknowledge the said writings,
355 again shown and explained to them, to be their act and deed, and consenteth that the same may be recorded, and the same is certified to the clerk of the county court of Greenup county court for record.

Given under our hands, this 30th day of December, 1847.

WILLIAM KOUNS, *J. P.*
JESSE POYNTER, *J. P.*

COMMONWEALTH OF KENTUCKY, *Greenup County,* } *To wit:*

I, William Corum, clerk of the county court for the county aforesaid, do certify that this deed from John Y. Montgomery and others to Alexander Campbell was produced to me in my office on the seventh of February, 1848, and proven to be the act and deed of John Y. Montgomery, Henry Stark, Daniel L. Clifton, Martha A. Howe, Rebecca E. Howe, and James Howe, by the oath of Jesse Poynter, a subscribing witness thereto, and on the third day of April, 1848, the said deed was fully proven to be the act and deed of the said Montgomery, Stark, and Clifton, and Martha A., Rebecca E., and James Howe, by the oath of William Kouns, another subscribing witness thereto, and the same, together with a certificate thereon endorsed, and this certificate hath been duly recorded in my office.

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Attest: WILLIAM CORUM, *Clk.*
A copy. Attest: GEO. A. CORUM, *C. G. C. C.*,
By A. M. DAVIDSON, *D. C.*

STATE OF KENTUCKY, *County of Greenup,* } *sct:*

I, George A. Corum, clerk of the county court and State aforesaid, do certify that the foregoing deed from Howe's heirs to Alexander Campbell is truly copied from the records of my said office.

In testimony whereof I have hereto subscribed my name and affixed my official seal, this 25th day of November, 1878.

GEO. A. CORUM, *Clk.*

STATE OF KENTUCKY, *County of Greenup,* } *sct:*

I, W. J. Worthington, presiding and sole judge of the county court, for the county and State aforesaid, do certify that George A. Corum, whose genuine signature is affixed to the foregoing certificate, was, on the day it bears date, clerk of said court, and that his said attestation is in due form of law and by the proper officer, and that his official acts are entitled to full credit.

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Given under my hand this 25th day of November, 1878.

W. J. WORTHINGTON, *J. G. C. C.*

STATE OF KENTUCKY, *Greenup County,* } *sct:*

I, George A. Corum, clerk of the county court for the county aforesaid, certify that W. J. Worthington, whose genuine signature is affixed to the foregoing certificate, was, on the day it bears date, presiding and sole judge of the Greenup county court, and that his said certificate and attestation are in due form of law.

In testimony, I have hereto set my hand and affixed my official seal, this 25th day of November, 1878.

GEO. A. CORUM, *Clk.*

Also deed from Alexander Campbell to T. D. White, dated February 7th, 1848, which is in words and figures as follows:

This indenture made and entered into this seventh day of February, 1848, by and between Alexander Campbell and Mary Campbell, his wife, of the first part, John Campbell, Thayer D. White,
358 Henry S. Willard, and Charles M. Wilson, of the second part, all of the county of Greenup, and State of Kentucky, witnesseth: That the said party of the first part, for and in consideration of the sum of one thousand four hundred and fifty dollars, to them in hand paid by the party of the second part in the manner following, to wit: John Campbell, the sum of six hundred and thirty-four dollars $\frac{37}{100}$, being seven-sixteenths of the whole amount; Thayer D. White, three hundred and sixty-two dollars $\frac{50}{100}$, being four-sixteenths; Henry S. Willard, two hundred and seventy-one dollars $\frac{87}{100}$, being three-sixteenths; and Charles M. Wilson, one hundred and eighty-one dollars $\frac{27}{100}$, being two-sixteenths of the whole amount, of the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed, and confirmed, and by these presents do grant, bargain, sell, and convey, and confirm unto the said party of the second part the following-described tract or parcel of land, and in the county of Greenup and Carter, to wit: All that part of Charles Fleming's eighteen thousand acres, which was sold at sheriff's sale as the property of the heirs of James Hughes, deceased, and purchased by William McConnell, and by him conveyed
359 to James Howe, and conveyed by the heirs of said James Howe, deceased, to the party of the first part, which will appear by reference (to the deed of conveyance, now record, in the clerk's office of the Greenup county court), which lies on the east side of Little Sandy river, in said counties of Greenup and Carter, saving and reserving out of this conveyance the reservation and exceptance made by said heirs in their conveyance to the party of the first part:

To have and to hold the land hereby conveyed unto the parties of the second part in the following shares and proportions, to wit: John Campbell, seven-sixteenths; Thayer D. White, four-sixteenths; Henry S. Willard, three-sixteenths, and Charles M. Wilson, two-sixteenths, severally, together with the appurtenances, privileges, and thereunto belonging, conveying the same title which they received from said heirs, but warranting and defending no further with exceptions and reservations aforesaid unto the party of the second part against their heirs and assigns forever, and all persons claiming by, through, or under them.

In testimony whereof, the said parties of the first part have hereunto subscribed their names and affixed their seals.

ALEXANDER CAMPBELL. [SEAL.]
MARY CAMPBELL. [SEAL.]

360 COMMONWEALTH OF KENTUCKY, } *sct:*
Greenup County, }

I, William Corum, clerk of the county court for the county aforesaid, do certify that this deed from Alexander Campbell and Mary Campbell, his wife, to John Campbell, Thayer D. White, Henry S. Willard, and Charles M. Wilson, was produced to me in my office on the 9th day of February, 1848, and acknowledged by the said Alexander Campbell to be his act and deed for the uses and purposes therein mentioned, and the said Mary Campbell, his wife, being examined by me separate and apart from her said husband, declared that she did freely and willingly seal and deliver the said writing, and wishes not to retract it, and the — being shown and explained to her, she acknowledged the same to be her act and deed for the uses and purposes therein mentioned, and consents that it may be recorded.

Whereupon said deed, together with this certificate, has been duly recorded.

Teste: WILLIAM CORUM, *Clerk*,
By JOHN TANNER, *D. C.*

A copy. Attest: GEO. A. CORUM, *C. G. C. C.*,
By A. M. DAVIDSON, *D. C.*

361 STATE OF KENTUCKY, } *sct:*
County of Greenup, }

I, Geo. A. Corum, clerk of the county court for the county and State aforesaid, certify that the foregoing is a full, true, and complete copy of the deed from Alexander Campbell, &c., to Thayer D. White, &c., as the same is of record in my office.

In testimony whereof, I have hereto subscribed my name and affixed my official seal, this 25th day of November, 1878.

[SEAL.] GEO. A. CORUM, *Clk.*

STATE OF KENTUCKY, } *sct:*
County of Greenup, }

I, W. J. Worthington, presiding and sole judge of the county court for the county and State aforesaid, certify that Geo. A. Corum, whose genuine signature is affixed to the foregoing certificate, was at the time it bears date clerk of said court, and that his attestation is in due form of law and made by the proper officer, and that his official acts are entitled to full credit.

Given under my hand, this 25th day of November, 1878.

W. J. WORTHINGTON, *J. G. C. C.*

STATE OF KENTUCKY, } *sct:*
County of Greenup, }

362 I, George A. Corum, clerk of the county court for the county aforesaid, certify that the signature of W. J. Worthington to the foregoing certificate is genuine; that he is sole judge of said court, and was on the day it bears date, and that his certificate and attestation are in due form.

Given under my hand and official seal, this 25th day of November, 1878.

[SEAL.] GEO. A. CORUM, *Clk.*

Also, deed from George W. Howe and wife to Wilson Culbertson & Co., dated July 5th, 1851, which is in words and figures as follows:

This indenture, made and entered into this 5th day of July, one thousand eight hundred and fifty-one, between George W. Howe and Sarah, his wife, of the county of Lawrence and State of Kentucky, of the first part, and Wilson Culbertson & Co., of the county of Greenup and State aforesaid, of the second part, witnesseth: That the party of the first part, for and in consideration of the sum of two hundred and fifty dollars to them in hand paid, the receipt of which is hereby acknowledged, have given, granted, bargained, and sold, and
363 by these presents doth give, grant, bargain, and sell to the said party of the second part all of our interest, right, and title to one-ninth part of James Howe's interest in the Charles Fleming's eighteen-thousand acre survey, which was sold at sheriff's sale as the property of James Hughes, deceased, and purchased by William McConnell, and by him conveyed to James Howe (under whom the party of the first part claims), by deed of record in the clerk's office of the Greenup county court, in deed book C, page 76, (seventy-six,) which lies on the east side of Little Sandy river, in said county, and in Carter county, saving, however, out of the conveyance the following tracts of land, sold and bequeathed by James Howe in his lifetime, to wit, five hundred acres to Martha Ann Howe, five hundred acres to Mary Montgomery, three hundred and thirty acres to Champness Gee, five hundred acres to John Howe, and one hundred acres, now owned by Greenup Furnace Co., three hundred acres to George W. Howe, now owned by Alfred Lowe, and one hundred acres to Daniel Howe; to have and to hold the lands hereby conveyed, with the appurtenances, being one-ninth undivided, unto the said
364 party of the second part, their heirs and assigns, forever. And the parties of the first part covenant to and with the parties of the second part that they are entitled to one-ninth part, as herein set forth, of, in, and to said land, and that they will warrant and defend the title to the lands herein conveyed, with the appurtenances, unto the said parties of the second part, their heirs and assigns, forever, against the claim or claims of all and every person or persons claiming the same by, through, or under them, or either of them, and against the claim or claims of all persons claiming the same by, through, or under them, or either of them, and against the claim or claims of all persons claiming the same by, through, or under James Howe, deceased, saving and excepting the several tracts hereinbefore saved and excepted.

In testimony whereof, the party of the first part have hereunto subscribed their names and affixed their seals, the day and year above written.

G. W. HOWE. [SEAL.]

COMMONWEALTH OF KENTUCKY, *Greenup County:*

I, William Corum, clerk of the county court for the county aforesaid, do certify that this deed from George W. Howe and Sarah,
365 his wife, to Wilson, Culbertcon & Co., was produced to me in my office, on the 5th day of July, 1851, and acknowledged by the said George W. Howe to be his act and deed.

Whereupon said deed and this certificate have been duly recorded in my said office.

Given under my hand, this 5th July, 1851.

Teste: WILLIAM CORUM, *Clerk.*

STATE OF KENTUCKY, }
Greenup County, Town of Greenup, } *ss:*

I, George A. Corum, clerk of the Greenup county court, in the State of Kentucky, do certify that the foregoing is a true, perfect, and complete copy of the record of the deed from George W. Howe and wife to Wilson, Culbertson & Co., as the same have been taken and copied from the records in my office.

In testimony whereof, I have hereunto set my hand and affixed my official seal, on this 12th day of May, anno Domini eighteen hundred and eighty.

[L. S.] GEO. A. CORUM, *Cl'k.*

STATE OF KENTUCKY, }
Greenup County, } *set:*

366 I, W. J. Worthington, presiding judge of the Greenup county court, in the State of Kentucky, do certify that the office of the clerk of said court for said county is kept in the town of Greenup, and that the foregoing attestation is in due form and by the proper officer, and the signature thereto is genuine.

In witness whereof, I have hereunto set my hand at Greenup aforesaid, this 12th day of May, anno Domini eighteen hundred and eighty.

W. J. WORTHINGTON, *J. G. C. C.*

STATE OF KENTUCKY, }
Greenup County. } *set:*

I, George A. Corum, clerk of the Greenup county court, in the State of Kentucky, do hereby certify that W. J. Worthington is presiding judge of said court, duly commissioned and qualified, and that the signature to the foregoing certificate is the genuine signature of the said W. J. Worthington.

In witness whereof, I have hereunto set my hand and seal of office, at Greenup, this 12th day of May, anno Domini, eighteen hundred and eighty.

GEO. A. CORUM, *Cl'k.*

Also, deed from John Y. Montgomery and wife to Wilson
367 Baird & Co., dated April, 1853, which is in words and figures, as follows:

This indenture, made between John Y. Montgomery and Mary

P., his wife, late Howe, Henry Stark, and Adelaid, his wife, late Howe, and Daniel F. Clifton, and Elizabeth I., his wife, late Howe, of the first part, and Charles M. Wilson, William Grubb, Samuel Baird, and James Steece, and Asa Boynton, under the firm and style of Wilson, Baird & Co., of the second part. Whereas heretofore the said parties, as a portion of the heirs of James Howe, with others of his heirs, made a deed of conveyance of their interest in certain lands in Greenup and Carter counties, which decended to them from their father to Alexander Campbell, who afterwards conveyed the same to John Culberston, C. M. Wilson, Thayer D. White, and Robert Scott, under the firm and style of Wilson, Scott & Co., and afterwards said Scott sold and disposed of his interest therein to the other members of the firm; and, whereas, afterwards said Grubb purchased out one-eight of said property from said Thayer D. White and Asa Boynton, the residue of his said interest, and the said parties of the second part, and now the owners of the said interest of the said parties of the first part.

368 And whereas some persons have doubted whether the said deed to said Campbell was properly authenticated, and does, therefore, pass their complete interest in the lands; and whereas the parties hereto are desirous that all debts as to the correctness thereof, shall [be] granted. Now, in consideration of the premises, and of one dollar to them in hand paid, they, the said parties of the first part, do bargain, sell, and convey, and hereby lease and confirm unto the said parties of the second part, their heirs and assigns forever all their right, title, and interest in and to the said land conveyed and sought to be conveyed to said Wilson, &c., by the deed of said Campbell, and which was sought to be conveyed by their deed to said Campbell; to which deed reference is made for a particular description of the same, together with all the premises and appear-ances thereto belonging. To have and to hold the said land, their fixtures and appurtenances hereby conveyed to them, the said parties of the second part, their heirs and assigns forever.

In testimony, they, the parties of the first part, do put their names, &c. this —— day of April, 1853.

JOHN J. MONTGOMERY. [SEAL.]
MARY I. MONTGOMERY. [SEAL.]
ELIZABETH CLIFTON. [SEAL.]
ADELAIDE STARK. [SEAL.]

369 I, Jacob Kouns, deputy for William Corum, clerk of the county court of Greenup county, in the Commonwealth of Kentucky, do hereby certify that this deed from John G. Montgomery and Mary I., his wife, Daniel L. Clifton and Elizabeth I., his wife, and Henry Stark and Adelaide, his wife, to Wilson, Baird & Co. was this day produced to me in my office, and acknowledged by the said John Y. Montgomery to be his act and deed, and the said Mary I., wife of the said John Y. Montgomery, Elizabeth I., wife of the said Daniel Clifton, and Adelaide, wife of the said Henry Stark, being examined by me privily and apart from their said husbands, declared that they did freely and wil-

lingly seal and deliver the said writing, and wished not to retract it, and acknowledged the said writing again shown and examined to them to be their free and voluntary act and deed, and consented that the same might be recorded in Greenup and Carter counties, where the premises lie. Whereupon said deed, together with this certificate, hath been duly recorded in my said office.

Given under my hand this 28th day of April, 1853.

J. N. KOUNS,
Deputy for William Corum, Clk Greenup Co. C.

370 STATE OF KENTUCKY, }
Greenup County, Town of Greenup, } *ss:*

I, George A. Corum, clerk of the Greenup county court, in the State of Kentucky, do certify that the foregoing is a true, perfect, and complete copy of the record of the deed from John Y. Montgomery and wife to Wilson, Baird & Co., as the same has been taken and copied from the records in my office.

In testimony whereof, I have hereunto set my hand and affixed my official seal, on this 12th day of May, anno Domini eighteen hundred and eighty.

[L. S.]. GEO. A. CORUM, *Clk.*

STATE OF KENTUCKY, }
Greenup County, } *sct:*

I, W. J. Worthington, presiding judge of the Greenup county court, in the State of Kentucky, do certify that the office of the clerk of said county for said county is kept in the town of Greenup, and that the foregoing attestation is in due form and by the proper officer, and the signature is genuine.

In witness whereof, I have hereunto set my hand at Greenup
371 aforesaid, this 12th day of May, anno Domini eighteen hundred and eighty.

W. J. WORTHINGTON,
J. G. C. C.

STATE OF KENTUCKY, }
Greenup County, } *sct:*

I, George a Corum, clerk of the Greenup county court, in the State of Kentucky, do hereby certify that W. J. Worthington is presiding judge of said court, duly commissioned and qualified, and that the signature to the foregoing certificate is the genuine signature of the said W. J. Worthington.

In witness whereof, I have hereunto set my hand and seal of office at Greenup, this 12th day of May, anno Domini eighteen hundred and eighty.

GEO. A. CORUM, *Clk.*

Also deed from James Howe to J. Y. Worthington, dated January 1st, 1838, which is in words and figures as follows:

Know all men by these presents, that I, James Howe, of Greenup county and State of Kentucky, for the love and natural affection I

bear for my daughter, late Mary J. Howe, now the wife of John Y. Montgomery, and for the further consideration of one dollar
372 to me in hand paid, the receipt whereof I do hereby acknowledge, have granted, sold, remised, released, and forever quit-claimed, and by these — do remise, release, and forever quit-claim unto John Montgomery, for the special use and benefit of the said Mary J., his wife, and his issue, *aurtawe messuage*, now in the sizen and possession of the said John Montgomery, containing two hundred and fifty acres, beginning at a beech tree on the west side of Wilson's creek, by the side of the path running from thence south 5° west to Grayson's line as heretofore run by sundry surveyors; from thence south 85° east with said line, crossing Wilson's creek in an old sugar camp, between said Montgomery's and David Devor's, continuing the same course to the top of the hill on the east side of the creek; from thence and the beginning far enough northerly to include two hundred and fifty acres, it being a part and parcel of 18,000-acre tract patented to Charles Fleming and conveyed through and to sundry persons till it was conveyed to me by Wm. McConnell; which two hundred and fifty acres of land I now confirm to the said John Montgomery for the use of his wife, Mary J., my beloved daughter, to have and to hold the aforesaid premises,
373 with all the priveleges and appurtenances, to the said John Montgomery and his wife, Mary J. Montgomery, and her heirs forever, so that neither I, the said James Howe, nor my heirs, or any person or persons claiming under me or them, shall at any time hereafter, by any way or means, have claims, or demand any right [or] title to the aforesaid premises or appurtenances, or to any part or parcel thereof.

In testimony whereof I have hereunto set my hand and affixed my seal, this 1st day of January, one thousand eight hundred and thirty-eight.

JAMES HOWE. [SEAL.]

STATE OF KENTUCKY, }
Carter County, } *set:*

I, Joseph R. Ward, clerk of the court for the county aforesaid, do hereby certify that the deed from James Howe to John Montgomery was produced to me in my office on the 4th day of October, 1838, and acknowledged by the said grantor to be his act and deed, and the same has been duly recorded.

Attest: J. R. WARD, *C. C. C. C.*

A true copy.

E. P. DAVIS, *Clerk.*
By L. CANARD, *D. C.*

Also copy of deed from Daniel B. Howe and wife, dated 11th November, 1850, to Wilson, Culbertson & Co.

374 Which is in words and figures as follows:

This indenture, made and entered into this eleventh day of November, in the year of our Lord one thousand eight hundred and fifty, by and between Daniel B. Howe and Mary, his wife, of the one

part, of the county of Greenup and State of Kentucky, and Charles M. Wilson, John Culbertson, Samuel Culbertson, Thayer D. White, and William Grubb, partners, trading under the firm of Wilson, Culbertson & Co., of the other part, of said county and State aforesaid, witnesseth: That the said Daniel B. Howe and Mary, his wife, have this day, for and in consideration of the sum of one hundred dollars to them in hand paid, the receipt whereof they doth hereby acknowledge, hath given, granted, bargained, and sold, aliened, and conveyed, and by these presents doth give, grant, bargain, sell, and convey unto the firm aforesaid, trading as aforesaid, a certain tract or parcel of land lying and being partly in Greenup and partly in Carter counties, all right, power, title, and interest in the one-ninth undivided part of the east half of the Fleming survey of 18,000 acres, being part of the land we purchased from William P. Hood and Matilda, wife of the said Hood, said Matilda Hood, late
375 Matilda Howe, one of the heirs of James Howe, deceased, and for more certainty the deed from said William P. Hood and wife to the said Daniel B. Howe for said described land is referred to, which deed is recorded in the clerk's office of the county court of Carter county and State aforesaid (the said Matilda coinherited it with eight other heirs), being one-ninth of the east half of that tract or parcel of land of Chas. Fleming's 18,000 acre survey, which was sold at sheriff's sale as the property of the heirs of James Hughes, deceased, and purchased by William McConnell, and he conveyed the same to James Howe, who died seized thereof, and which the said Matilda is equal, with eight other co-heirs, inherited from their ancestor, James Howe, deceased, the said Matilda and her husband, William P. Hood, sold and conveyed the same to the said Daniel P. Howe. Said land is lying on the east side of Little Sandy river, in the counties of Greenup and Carter, and being a part of the same tract which six of the other heirs of said Howe, dec'd, conveyed to Alexander Campbell, who conveyed the same to the firm of Wilson, Campbell and Willard as appears of record in deed-book I, page
172, hereby making the same exceptions and reservations out
376 of this conveyance as are excepted in the foregoing enumerated conveyances, and also all other reservations so far as we have sold the said land and made conveyances.

To have and to hold our interest in the premises aforesaid, with the exceptions, as aforesaid, unto the said firm, jointly and severally, their heirs and assigns forever, against ourselves, our heirs, executors, and administrators, and against the claim or claims of any and all persons claiming by, through, or under us, with all and singular the privileges and appurtenances unto them, the parties of the second part, their heirs and assigns, forever, making the same conveyance with the same stipulations the said heirs made to the said Alexander Campbell, but not warranting or defending any further, nor against the claim of any one not claiming under us.

In testimony whereof, we have hereunto set our hands and affixed our seals, the day and date first above written.

DANIEL B. HOWE. [SEAL.]
MARY HOWE. [SEAL.]

COMMONWEALTH OF KENTUCKY, } *sct:*
County of Greenup, }

I, William Corum, clerk of the county court for the county aforesaid, do certify that this deed from Daniel B. Howe and Mary
377 Howe, his wife, to Charles M. Wilson, John Culbertson, Samuel Culbertson, Thayer D. White, and William Grubb, was produced to me in my office on the eleventh day of November, 1850, and acknowledged by the said Daniel B. Howe to be his act and deed, and the said Mary Howe, wife of the said Daniel B. Howe, being examined by me privily and apart from her said husband, declared that she did freely and willingly seal and deliver said writing, and wishes not to retract it, and acknowledged said writing, again shown and explained to her, to be her act and deed, and consented that the same may be recorded.

Whereupon said deed, together with this certificate, has been duly recorded in my said office.

Attest: WILLIAM CORUM, *Clerk.*

STATE OF KENTUCKY, } *ss:*
Greenup County, Town of Greenup, }

I, George A. Corum, clerk of the Greenup county court, in the State of Kentucky, do certify that the foregoing is a true, perfect, and complete copy of the record of the deed from Daniel B. Howe and wife to Wilson, Culbertson & Co., as the same has been taken and copied from the records in my office.

378 In testimony whereof I have hereunto set my hand and affixed my official seal, on this 12th day of May, anno Domini eighteen hundred and eighty.

[L. S.] GEO. A. CORUM, *Clerk.*

STATE OF KENTUCKY, } *sct:*
Greenup County, }

I, W. J. Worthington, presiding judge of the Greenup county court, in the State of Kentucky, do certify that the office of the clerk of said court for said county is kept in the town of Greenup, and that the foregoing attestation is in due form and by the proper officer, and the signature thereto is genuine.

In witness whereof, I have hereunto set my hand at Greenup aforesaid, this 12th day of May, anno Domini eighteen hundred and eighty.

W. J. WORTHINGTON,
J. G. C. C.

STATE OF KENTUCKY, } *sct:*
Greenup County, }

I, George A. Corum, clerk of the Greenup county court, in the State of Kentucky, do hereby certify that W. J. Worthington is presiding judge of said court, duly commissioned and qualified, and that the signature to the foregoing certificate is the genuine
379 signature of the said W. J. Worthington.

In witness whereof, I have hereunto set my hand and seal

of office, at Greenup, this 12th day of May, anno Domini eighteen hundred and eighty.

GEO. A. CORUM, *Clk.*

The plaintiff, in further support of the competency of said original deed, introduced evidence showing possession by said James Howe of portions of said 18,000 acres of land patented to Charles Fleming, and also evidence showing sales of portions thereof by the said James Howe in addition to those shown by the deeds above mentioned; and also evidence showing settlements of divers persons on portions of said land by and under said James Howe.

And the plaintiffs, in further support of the competency of said deed, offered by parol testimony to prove that there was recorded in the deed-book of the clerk's office of the Kentucky court of appeals, containing deeds recorded in the year 1816, a deed identical in terms with the aforesaid paper purporting to be the original.

To the introduction of which evidence the defendants objected, and the court sustained said objection, and declined to hear said evidence.

380 To which ruling of the court plaintiffs at the time excepted and still except.

And the court thereupon sustained the objection of the defendants to the reading of the aforesaid paper claimed by plaintiffs to be the original deed.

To which ruling of the court the plaintiffs at the time excepted and still except.

Said paper is in words and figures as follows, to wit:

This indenture made this thirty-first day of December, in the year one thousand seven hundred and ninety-six, between William Fleming, John Bernard, and Richard Bernard, and Charles Marshal, by William Marshal, his attorney in fact, of the State of Virginia, of the one part, and John Bryan, of the State of New Jersey, of the other part, witnesseth: That whereas a certain Chas. Fleming, late of the county of Chesterfield and Commonwealth of Virginia, now deceased, was seized and possessed of three tracts or parcels of land situate, lying, and being in the county of Mason and Commonwealth of Kentucky, the one for sixteen thousand one hundred and ninety-one acres, one other for eighteen thousand acres, and the third for twenty thousand acres, amounting in

381 the whole to fifty-four thousand one hundred and ninety-one acres. And whereas the before-named Charles Marshall was entitled to one moiety of the said tracts or parcels of land as having located the same for the said Charles Fleming; and the said Charles Marshall having sold to John and William Bryan thirteen thousand three hundred and thirty-four acres of the said land, did in the lifetime of the said Charles Fleming request a conveyance for that amount to be made [to] the said John and William Bryan, which was accordingly done by deed, which did not ascertain the bounds of the same or the tract out of which it was to be taken, but only conveying that quantity out of the aforesaid three tracts. And

whereas the said Charles Fleming, deceased, after having made the said conveyance to the said John and William Bryan, duly made and published his last will and testament in writing, bearing date the eighth day of October, in the year one thousand seven hundred and ninety-three, in which will he gave, among other lands, the said three tracts or parcels of land above mentioned to the said William Fleming, John Bernard, and Richard Bernard, in trust, to be sold for the benefit of his creditors and to payment [of] legacies as are in the said will thereafter mentioned and directed, as
382 by the said last will and testament of record in the court of Chesterfield county will more fully and at large appear.

And whereas the said Charles Marshall is still entitled in equity to thirteen thousand seven hundred and sixty-one and one-half acres of the said land, and the said William Fleming, John Bernard, and Richard Bernard and Charles Marshall have agreed that the whole of the said three tracts of land not conveyed to the said John and William Bryan, by the said Charles Fleming, dec'd, should be sold, and the purchase-money arising therefrom to be divided as the different parties may be entitled to receive, now this indenture, witnesseth: That the said William Fleming, John Bernard, and Richard Bernard, by virtue of the power and authority to them given, and in pursuance of the trust reposed in and by the said last will and testament, and for and in consideration of the sum of one thousand three hundred and sixty-six pounds eighteen shillings and six pence, current money of Virginia, to them in hand paid by the said John Bryan, the receipt whereof they do hereby acknowledge, and thereof do release, acquit, and discharge him and his heirs forever, and the said Charles Marshall, by the said Charles Marshall, his attorney-in-fact, in consideration of the agree-
383 ment aforesaid, have granted, bargained, and sold, and by these presents do grant, bargain, and sell to the said John Bryan, and to his heirs forever, all the residue of the said three tracts of land not before conveyed to John and William Bryan, and amounting to forty thousand eight hundred and fifty-seven acres, which said tracts or parcels of land were granted by the Commonwealth of Virginia to the said Charles Fleming by patents bearing date on the first day of April, in the year one thousand seven hundred and ninety-two, and duly recorded in the register's office for the aforesaid Commonwealth, reference being thereunto had, will more fully appear, and are bounded as follows, to wit: The sixteen thousand one hundred and ninety-one acre tract on the waters of the Ohio, and beginning at the south corner of an entry in the name of William Payne, for fourteen hundred six and an half acres at ten white oaks and four black oaks on the top of a hill, also a white oak marked W. P. P. S., and another I. S.; thence north forty-five degrees east four hundred poles with said Payne's line to Charles Chaddock's line, to an ash, gum, white oak, hickory, poplar, and a sugar tree, and a beech marked I. S. standing in a bottom, on the east side of a small run; thence south forty-five degrees east one hundred and ninety-
384 four poles with Craddock's line to his corner, two white oaks, two maples, two sour-trees, two sugar trees, also a beech marked

I. S.; thence north forty-five degrees east three hundred and eighty poles with Craddock's line to a forked maple, gum, poplar, black oak, and two sour-woods; thence south sixty-five degrees east one thousand and eighty poles to Enoch O'Brien's south corner two white oaks and two black oaks; thence north forty-five degrees east six hundred poles with O'Brien's line to Minor Winn's line, two white oaks and sour-wood; thence south forty-five degrees east six hundred and thirty-five poles to four white oaks; thence north forty-five degrees east eight hundred poles to said Winn's east corner, three white oaks and two sour-woods; thence south forty-five degrees east one hundred and forty-nine poles with a line of Charles Fleming's eighteen thousand acre survey, passing his corner and binding on General James Wilkinson & Co. to the north corner of Chas. Fleming's twenty thousand-acre entry, two white oaks, two black oaks, and two sour-woods; thence south forty-five degrees west two thousand five hundred and sixty poles with said Fleming's line to his west corner, six white oaks; thence north forty-five degrees west two thousand and seven poles to the beginning. The tract
385 of eighteen thousand acres is bounded as follows, to wit: Beginning at the east corner of William Fitzhugh's twelve thousand acre entry, four hickories and six white oaks standing in a bottom; thence south forty-five degrees west twelve hundred and eighty poles to two red oaks, two dogwoods, and a maple; thence south forty-five degrees east two thousand two hundred and fifty poles to five white oaks; thence north forty-five degrees east twelve hundred and eighty poles to a stake; thence north forty-five degrees west two thousand two hundred and fifty poles to the beginning. And the twenty thousand acre entry is bounded as follows, to wit: Beginning at the south corner of an entry in the name of James Wilkinson & Company of thirty-seven thousand two hundred and fifty-six acres, five white oaks and three black oaks; thence south forty-five degrees west two thousand five hundred and sixty poles to three black oaks and a sour-wood; thence north forty-five degrees west twelve hundred and fifty poles to six white oaks; thence north forty-five degrees east two thousand five hundred and sixty poles to two white oaks, two black oaks, and two sour-woods; thence south forty-five degrees east twelve hundred and fifty poles to the beginning. To have and to hold the said tracts or parcels of land with their and every of their appurtenances
386 (excepting the land conveyed by the said Charles Fleming to John and William Bryan), to the said John Bryan and his heirs forever, to the only proper use and behoof of him, the said John Bryan, and his heirs forever, and the said William Fleming, John Bernard, and Richard Bernard, for themselves and their respective heirs, covenant and agree to and with the said John Bryan and his heirs forever that they and their heirs shall and will warrant and forever defend the said three tracts or parcels of land, after excluding the part formerly conveyed to John and William Bryan, to the said John Bryan and his heirs forever from the claim and demand of them, the said William Fleming, John Bernard, and Richard Bernard, and their respective heirs, and all persons claiming

from — under them, or either of them, and all other person or persons whatever claiming right from under the said Charles Fleming, but not from the claim or demand of any other person or persons whatever.

In testimony whereof, the said William Fleming, John Bernard, and Richard Bernard, and Charles Marshall, by William Marshall, his attorney-in-fact, have hereunto affixed their respective hands and seals, the day, month, and year first written.

387 WM. FLEMING. [SEAL.]
JOHN BERNARD. [SEAL.]
RICH'D BERNARD. [SEAL.]
CHARLES MARSHALL, [SEAL.]
By WILLIAM MARSHALL,
His Att'y-in-Fact.

Signed, sealed, and delivered in the presence of—
RICHARD BROMLEY.
THOMAS WM. LAUSEN.
JACOB VALENTINE.
W. F. & W. M.

Know all men by these presents, that whereas John Bryan, the grantor within named, together with Maryan, his wife, having this day, by a certain deed indented, sold and conveyed unto Samuel Sackett the premises mentioned within, and every part and parcel thereof, with their and every of their appurtenance, to have and to hold unto him, the said Samuel Sackett, his heirs and assigns forever. Now, therefore, know ye, that I, the said John Bryan, in order more fully to confirm and establish the said conveyance and to vest in the said Samuel Sackett, as well the said premises within contained, as the benefit of the grants, covenants, and agreements for confirmation of the title thereof in the within deed contained for divers good causes and consideration we thereunto moving,
388 for and in consideration of the sum of five shillings to me in hand paid, the receipt whereof is hereby acknowledged, have given, granted, transferred, assigned, and set over, and by these presents do give, grant, transfer, assign, and set over the premises within contained, and all and singular the covenants, grants, and agreements within expressed, accompanying and being with the said premises, unto the said Samuel Sackett, his heirs and assigns, to and for his and their own proper use and benefit, hereby authorizing and empowering the said Samuel Sackett, his heirs and assigns on any eviction, expulsion, impeachment, or failure of title in the premises in my name or otherwise, as he may be advised by his counsel, learned in the law; but for his and their own proper use and benefit to ask, demand, sue for, and recover of and from the said William Fleming, John Bernard, Richard Bernard, and Charles Marshall, the grantors within named, all such damages, costs, and charges as I myself or my assigns, by virtue of the said grants, covenants, and agreements, might or could lawfully ask, demand, sue for, and recover.

In testimony whereof, I have hereunto set my hand and
389 seal, this twenty-eighth day of January, in the year one thousand seven hundred and ninety-seven (1797).

JOHN BRYAN. [SEAL.]

Sealed and delivered in the presence of—(the names John Bernard, Rich'd Bernard, and Charles Marshall first interlined between the fifth and sixth lines from the bottom—

ABR'M LOURANCE.

VIRGINIA, }
City of Richmond, } *set:*

Be it known to all whom it may concern, That on this second day of January, one thousand seven hundred and ninety-seven, came personally before me Robert Mitchell, mayor of the said city, William Fleming, John Bernard, Richard Bernard, and William Marshall, attorney in fact for Charles Marshall, and acknowledged the annexed indenture of bargain and sale made to John Bryan to be their acts and deeds, hands, and seals.

In testimony whereof, I have hereunto put my hand and affixed my seal of office, the day and year last aforesaid.

[SEAL.] ROBT MITCHELL, *Mayor.*

STATE OF KENTUCKY, *set:*

I, Archilles Sneed, clerk of the court of appeals for the State
390 aforesaid, being duly authorized by law to receive, admit, and record deeds and other writings in my office, do certify that the foregoing deed and power of attorney, together with the certificates thereto annexed, was produced to me in my office aforesaid on the eighth day of June, one thousand eight hundred and sixteen, and the same is duly admitted to record.

In testimony whereof, I have hereunto set my name, this 18th day of June, 1816.

ARCHILLES SNEED, *C. C. A.*

The plaintiff thereupon offered in evidence a certified copy from the clerk's office of the Kentucky court of appeals of a deed from John Bryan and wife to Sam'l Sackett, dated January 28th, 1797.

To the reading of which the defendants objected, and the court sustained their objection.

To which ruling of the court the plaintiffs at the time excepted, and still except.

Said certified copy offered in evidence is in the words and figures as follows, to wit:

STATE OF KENTUCKY:

Court of Appeals.

1879, JUNE 1ST.

391 This indenture, made this twenty-eighth day of January, in the year one thousand seven hundred and ninety-seven,

between John Bryan and Maryan, his wife, of township of Bedminster, county of Somerset, and State of New Jersey, of the one part, and Samuel Sackett, merchant, of the city of New York, of the other part, witnesseth: That the said John Bryan and Maryan, his wife, in consideration of the sum of ten shillings and nine pence per acre, current money of the State of New York, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, and released, and by these presents do grant, bargain, sell, alien, remise, and release unto the said Sam'l Sackett, and to his heirs and assigns forever, all those parcels and tracts of land hereinafter mentioned, situate, lying, and being in the county of Mason, and State of Kentucky, on the waters of Ohio, a part of which said parcels or tracts of land the said John Bryan holds by virtue of a deed executed by the executors of Col. Charles Fleming, of the State of Virginia, and a part by a patent from the Governor of the State of Kentucky, reference being had to said deed and patent may more fully appear, and are bounded as follows, viz: Sixteen thousand one hundred and ninety-one acres of land on the waters of
392 the Ohio, and beginning at the south corner of an entry in the name of William Payne, for fourteen hundred six and a half acres at ten white oaks and four black oaks on the top of a hill; also a white oak marked W. R. P. S.; another I. S.; thence north forty-five degrees east four hundred poles with said Payne's line to Charles Craddox's line to an ash, gum, white oak, hickory, poplar, and sugar tree, and a beech marked I. S., standing in a bottom on the east side of a small run; thence south forty-five degrees east one hundred and ninety-four poles with Craddock's line to the corner, two white oaks, two maples, sour-trees, two sugar trees; also a beech marked I. S.; thence north forty-five degrees east three hundred and eighty poles with Craddock's line to a forked maple, gum, poplar, black oak, and two sour-woods; thence south sixty-five degrees east one thousand and eighty poles to Enoch O'Brien's south corner, two white oaks and two black oaks; thence north forty-five degrees east six hundred poles with O'Brien's line to Minor Winn's line, two white oaks and sour-wood; thence south forty-five degrees east six hundred and thirty-five poles to four white oaks; thence north forty-five degrees east eight hundred poles to said Winn's east corner, three white oaks and two sour-woods;
393 thence south forty degrees east one hundred and fifty-nine poles with a line of Charles Fleming's eighteen thousand acre survey, passing his corner and binding on General James Wilkinson & Co., to the north corner of Charles Fleming's twenty thousand acre entry, two white oaks, two black oaks, and two sour-woods; thence south forty-five degrees west two thousand five hundred and sixty poles with said Fleming's line to his west corner, six white oaks; thence north forty-five degrees west two thousand and seven poles to the beginning. The tract of eighteen thousand acres is bounded as follows, to wit: Beginning at the east corner of William Fitzhugh's twelve thousand acre survey, four hickories and six white oaks standing in a bottom; thence south forty-five degrees west twelve hundred and eighty poles to two red oaks, two dogwoods,

and a maple; then south forty-five degrees east two thousand two hundred and fifty poles to five white oaks; thence north forty-five degrees east twelve hundred and eighty poles to a stake; thence north forty-five degrees west two thousand two hundred and fifty poles to the beginning. And a twenty thousand acre entry is bounded as follows, to wit: Beginning at the south corner of an entry in the name of James Wilkinson & Company, of thirty-seven thousand
394 two hundred and fifty-six acres, five white oaks and three black oaks; thence south forty-five degrees west two thousand five hundred and sixty poles to three black oaks and a sour-wood; thence north forty-five degrees west twelve hundred and fifty poles to six white oaks; thence north forty-five degrees east two thousand five hundred and sixty poles to two white oaks, two black oaks, and two sour-woods; thence south forty-five degrees east twelve hundred and fifty poles to the beginning. And also a nine thousand and six hundred acre entry is bounded as follows, to wit: Beginning in Richard Adams' line of his twenty thousand acre survey, eight hundred poles north forty-five degrees west from his east corner at a white oak and hickory; thence north forty-five degrees west one thousand six hundred and eighteen poles with said line to his north corner of his twenty thousand acre survey to B, a white oak and black oak; thence north forty-five degrees east nine hundred and forty-nine poles to C, a white oak and red oak; thence south forty-five degrees east one thousand six hundred and eighteen poles to D, two black oaks and hickory; thence south forty-five degrees west nine hundred and forty-nine poles to the beginning. The four several
395 tracts of land above mentioned, containing sixty-three thousand seven hundred and ninety-one acres, to have and to hold the same, with their and every of their appurtenances, excepting twenty-eight thousand three hundred and thirty-four acres of land herein, included in the above quantity, which was heretofore deeded to the said Samuel Sackett by William Bryan and the said John Bryan, which will more fully appear [by] having reference to said deed to the said Sam'l Sackett and his heirs forever, to the only proper use and behoof of him the said Samuel Sackett and his heirs forever, and the said John Bryan and Maryan, his wife, and their heirs, covenant and agree to and with the said Samuel Sackett and his heirs forever, shall and will warrant and defend forever by these presents from the claim and demand of him, the said John Bryan, and Maryan, his wife, and their heirs, and all persons claiming from or under them, or either of them, but not from the claim or demand of any other person or persons whatsoever.

In testimony whereof the said John Bryan and Maryan, his wife, have hereunto affixed their hands and seals the day, month, and year first written.

MARYAN BRYAN. [SEAL.]
JOHN BRYAN. [SEAL.]

396 Signed, sealed, and delivered in the presence of—
ABR'M LAWRENCE.
JOHN HENRY.

We, Rob't Blair, Wm. McEwen, Esquires, two of the justices of the peace in and for the [county] of Somerset, in the State of New Jersey, do hereby certify that on the third day of April, in the year of our Lord one thousand seven hundred and ninety-seven, personally appeared before us the within-named John Bryan and Maryan his wife, who reside in said county of Somerset, acknowledged in our presence that they executed the same for the uses and purposes therein mentioned. And the said Maryan, being examined by us apart from her husband, acknowledged that she executed the same freely and voluntarily, and freely relinquished her right of dower in the lands in the said deed mentioned, do allow the same to be recorded, as witness our hands.

[L. S.]

ROB'T BLAIR.
WILLIAM McEWEN.

I, Frederick Frelinghuysen, clerk of the county of Somerset, in the State of New Jersey, do certify that the above-named Rob't Blair and William McEwen, whose names, in their proper handwriting, are subscribed to the above certificate of acknowledgement, are
397 justices of the peace in and for the county of Somerset.

In witness whereof, I have hereunto set the seal of said county and subscribed my name, this 4th day of April, 1897.

FRED. FRELINGHUYSEN,
Clerk.

KENTUCKY, *set:*

I, Archilles Sneed, clerk of the court of appeals for the State aforesaid, do hereby certify that the foregoing deed, with the testimonials thereto annexed, was produced to me in my office in Frankfort on the seventh day of July, 1816, and that the same is duly recorded.

In testimony whereof, I have hereunto set my name, the day and year aforesaid.

ARCHILLES SNEED, *C. C. A.*

STATE OF KENTUCKY:

Court of Appeals.

I, Thomas C. Jones, clerk of the court of appeals aforesaid, hereby certify that the foregoing is a true copy of the deed of John Bryan, &c., to Samuel Sackett, as recorded in my office.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this 2d day of June, 1879.

[L. S.]

T. C. JONES,
Clerk Court Appeals.

398 Plaintiffs thereupon offered in evidence a paper claimed by them to be the original of the deed last above mentioned, to the reading of which the defendants objected.

The plaintiffs thereupon offered, in support of the competency of said paper, the same evidence offered in support of the original deed last above mentioned; and further, that said deed had been found in the papers of the case of Hughes against Shore's heirs, on the

same occasion and in the same manner as the original above named, and was produced here by the aforesaid deputy clerk among the papers of the said case and offered to prove by parol testimony that a deed identical in terms with the said paper claimed by plaintiffs to be the original was recorded in the deed-book in the clerk's office of the Kentucky court of appeals, containing deeds recorded in the year 1816.

The court thereupon sustained the objection of defendants, and refused to permit the said paper to be read. To which ruling of the court the plaintiffs at the time excepted, and still except.

The said deed is in words and figures as follows:

399 This indenture, [made this —] day of January, in the year one thousand seven hundred and ninety-seven, between John Bryan and Maryan, his wife, of the township of Bedminster, county of Somerset, and State of New Jersey, of the one part, and Samuel Sackett, merchant, of the city of New York, of the other part, witnesseth: That the said John Bryan and Maryan, his wife, in consideration of the sum of ten shillings and nine pence per acre, current money of the State of New York, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, and released, and by these presents do grant, bargain, sell, alien, remise, and release unto the said Samuel Sackett, and to his heirs and assigns forever, all those parcels and tracts of land hereinafter mentioned, situated, lying, and being in the county of Mason and State of Kentucky, on the waters of the Ohio, a part of which said parcel or tract of land the said John Bryan holds by virtue of said deed, executed by the executors of Col. Charles Fleming, of the State of Virginia, and a part by a patent from the Governor of the State of Kentucky, reference being had to said deed and patent —— may more fully appear, and are bounded as

400 follows, viz: Sixteen thousand one hundred and ninety-one acres of land on the waters of the Ohio, and beginning at the south corner of an entry in the name of William Payne for fourteen hundred six and a half acres at ten white oaks and four black oaks on the top of a hill, also a white oak marked W. R. P. S., another I. S., thence north forty-five degrees east four hundred poles with said Payne's line to Charles Craddock's line to an ash, gum, white oak, hickory, poplar, and sugar tree and a beech marked I. S. standing in a bottom on the east side of a small run; thence south forty-five degrees east one hundred and ninety-four poles with Craddoch's line to a corner, two white oaks, two maples, sour-trees, two sugar trees, also a beech marked I. S.; thence north forty-five degrees east three hundred and eighty poles with Craddock's line to a forked maple, gum, poplar, black oak, and two sour-woods; thence south sixty-five degrees east one thousand and eighty poles to Enoch O'Brien's south corner, two white oaks and two black oaks; thence north forty-five degrees east six hundred poles with O'Brien's line to Minor Winn's line, two white oaks and sour-wood; thence south forty-five degrees east six hundred and thirty-five poles to four white oaks; thence north forty-five degrees east eight

401 hundred poles to said Winn's east corner, three white oaks and two sour-woods; thence south forty-five degrees east

and fifty-nine poles with a line of Charles Fleming's eighteen thousand acre survey, passing his corner and binding on General James Wilkinson & Co. to the north corner of Charles Fleming's twenty thousand acre survey, two white oaks, two black oaks, and two sour-woods; thence south forty-five degrees west two thousand five hundred and sixty poles with said Fleming's line to his west corner, six white oaks; thence north forty-five degrees west two thousand and seven poles to the beginning. The tract of eighteen thousand acres is bounded as follows, to wit: Beginning at the east corner of William Fitzhugh's twelve thousand acre entry, four hickories and six white oaks standing in a bottom, thence south forty-five degrees west twelve hundred and eighty poles to two red oaks, two dogwoods, and a maple; thence south forty-five degrees east two thousand two hundred and fifty poles to five white oaks; thence north forty-five degrees east twelve hundred and eighty poles to a stake; thence north forty-five degrees west two thousand two hundred and fifthy poles to the beginning. And a twenty thousand acre entry is bounded as follows, to wit: Beginning at the south corner of an entry
402 in the name of James Wilkinson & Company, of thirty-seven thousand two hundred and fifty-six acres, five white oaks, and three black oaks; thence south forty-five degrees west two thousand five hundred and sixty poles to three black oaks and a sour-wood; thence north forty-five degrees west twelve hundred and fifty poles to six white oaks; thence north forty-five degrees east two thousand five hundred and sixty poles to two white oaks, two black oaks, and two sour-woods; thence south forty-five degrees east twelve hundred and fifty poles to the beginning. And also a nine thousand and six hundred acre entry is bounded as follows, to wit: Beginning on Richard Adam's line of his twenty-thousand-acre survey, eight hundred poles north forty-five degrees west from his east corner at a white oak and hickory; thence north forty-five degrees west one thousand six hundred and eighteen poles with said line to his north corner of his twenty-thousand-acre survey to B, a white oak and black oak; thence north forty-five degrees east nine hundred and forty-nine poles to C, a white oak and red oak; thence south forty-five degrees east one thousand six hundred and eighteen poles to D, two black oaks and hickory; thence south forty-five de-
403 grees west nine hundred and forty-nine poles to the beginning. The four several tracts of land above mentioned, containing sixty-three thousand seven hundred and ninety-one acres. To have and to hold the same, with their, and every of their, appurtenances (excepting twenty-eight thousand three hundred and thirty-four acres of land herein included in the above quantity, which was heretofore deeded to the said Samuel Sackett by William Bryan and the said John Bryan, which will fully appear, having reference to said deed), to the said Samuel Sackett and his heirs forever, to the only proper use and behoof of him, the said Samuel Sackett, and his heirs forever; and the said John Bryan and Maryan, his wife, and their heirs, covenant and agree to, and with the said Samuel Sackett and his heirs forever shall and will warrant and

defend forever by these presents from the claim, and demand of him, the said John Bryan and Maryan, his wife, and their heirs, and all persons claiming from or under them, or either of them, but not from the claim or demand of any other person or persons whatever.

In testimony whereof, the said John Bryan and Maryan, his wife, have hereunto affixed their hands and seals the day, month, and year first written.

JOHN BRYAN. [SEAL].
MARYAN BRYAN. [SEAL.]

404 Signed, sealed, and delivered in the presence of—
ABR'M LOURANCE.
JOHN HENRY.

We, Robert Blair and William McEwen, esquires, two of the justices of the peace in and for the — of Somerset, in the State of New Jersey, do hereby certify that on the third day of April, in the year of our Lord one thousand seven hundred and ninety-seven, personally appeared the within-named John Bryan, and Maryan, his wife, who reside in said county of Somerset, acknowledged in our presence that they executed the same for the uses and purposes therein mentioned; and the said Maryan, being examined by us apart from her husband, acknowledged that she executed the same freely and voluntarily, and freely relinquished her right of dower in the lands in the said deed mentioned, do allow the same to be recorded, as witness our hands.

ROB'T BLAIR.
WILLIAM McEWEN.

I, Frederick Frelinghuysen, clerk of the county of Somerset, in the State of New Jersey, do certify that the above-named
405 Rob't Blair and William McEwen, whose names, in their proper handwriting, are subscribed to the above certificate of acknowledgement, are justices of the peace in and for the county of Somerset.

In witness whereof, I have hereunto set the seal of said county and subscribed my name, this 4th day of April, 1797.

[L. S.] FRED. FRELINGHUYSEN, *Clk.*

KENTUCKY, *Set.:*

I, Archilles Sneed, clerk of the court of appeal for the State aforesaid, do hereby certify that the foregoing deed, with the testimonials thereto annexed, was produced to me in my office in Frankfort, on the seventh day of July, 1816, and that the same is truly recorded.

In testimony whereof, I have hereunto set my name, the day and year aforesaid.

ARCHILLES SNEED, *C. C. A.* (42)

The plaintiffs further offered in evidence a paper claimed by them to be the original of a deed from Charles Fleming to John & Wm. Bryan, dated August 8th, 1794; to the reading of which the defendants objected.

And thereupon the plaintiffs offered, in support of the com-
406 petency of said deed, the same proof as was offered in support of the two last above-mentioned deeds; and further, that it was found at the same time and place, and produced from the same custody, as were the said two last above mentioned deeds, and in addition thereto, and in further support thereof, the plaintiff produced the clerk of the Mason county court, having with him deed-book B, containing deeds recorded in the said clerk's office of the Mason county court, beginning February 22d, 1794, and the two or three years next ensuing, and offered to show that there was recorded in said deed book, a deed identical in terms with the aforesaid original deed, and the court refused to hear the said deed as recorded in said deed-book read, or to admit the same in evidence.

To which ruling of the court the plaintiff at the time excepted, and still excepts.

And thereupon the plaintiffs offered and read in further support of the competency of said paper, what purported to be a copy thereof, duly certified from the clerk's office of the Mason county court. Said certified copy is in words and figures as follows, to wit:

This indenture, made this eighth day of August, in the
407 year of our Lord one thousand seven hundred and ninety-four, between Charles Fleming, of the one part, and John Bryan and William Bryan, of the other part, witnesseth:

That whereas the said John and William are purchasers of, and claim through, Charles Marshall the quantity of thirteen thousand and three hundred acres of land, which the said Charles was entitled to have and receive of and from the said Charles Fleming for and in consideration of his, the said Charles Marshall, having located the same, and at a much larger quantity of land, for the said Charles Fleming; and the said John and William Bryan, being entitled to receive a conveyance of the said quantity of thirteen thousand and three hundred acres of land, in the place of the said Charles Marshall and the said Charles Fleming, being to make the said conveyance of the said quantity of thirteen thousand and three hundred acres of land, by deed, with a special warranty to be taken out of a survey for eighteen thousand acres, patented to the said Charles Fleming, for and in consideration of the premises, and for and in consideration of the sum of ten shillings, current money, to the said Charles Fleming in hand paid by the said John and William, the receipt whereof the said Charles doth hereby acknowledge,
408 he, the said Charles Fleming for himself and his heirs, have bargained and sold, aliened and confirmed, and by these presents doth bargain and sell, alien and confirm to the said John Bryan and William Bryan, and their heirs and assigns forever, to hold as tenants in common, one certain tract or parcel of land, containing the quantity of thirteen thousand and three hundred acres, part of a survey of eighteen thousand acres, patented to the said Charles Fleming by the Governor of Virginia, situate, lying, and being in the county of Mason, on the waters of the Ohio, and bounded as follows, to wit:

Beginning at the east corner of William Fitzhugh's twelve thousand acre entry, at four hickories and six white oaks standing in a bottom, thence south forty-five degrees west one thousand two hundred and eighty poles to two red oaks, two dogwoods, and maple; thence south forty-five degrees east one thousand two hundred and eighty poles to a stake; thence north forty-five degrees east two thousand and forty-five poles to a stake in the line of the said eighteen thousand acre tract; thence [in] a direct line to the beginning. To have and to hold the said tract or parcel of land, with its appurtenances, to the said John and William Bryan, and their heirs and assigns, forever, to the only proper use and behoof of
409 them, the said John and William Bryan, and their heirs and assigns, forever; and the said Charles Fleming, for himself and his heirs, the said tract or parcel of land, with its appurtenances, to the said John Bryan and William Bryan, their heirs, and assigns, will warrant and forever defend against the claim of him, the said Charles Fleming, his heirs, and assigns, and all claiming under him or them, and truly and faithfully by these presents.

In testimony whereof, the said Charles Fleming hath hereunto put his hand and seal, the day and year aforesaid.

Teste: CHARLES FLEMING. [SEAL.]

We, justices of peace for the county of Woodford, do certify that Charles Fleming, whose name is signed to the preceding deed of conveyance, acknowledged the same in our presence to be his act and deed.

Given under our hands, this 8th day of August, 1795.

JOHN CRITTENDEN. [SEAL.]
MARQUIS CALMES. [SEAL.]

Woodford Court of Quarter Sessions, September Term, 1794.

This indenture of bargain and sale between Charles Flem-
410 ing, of the one part, and John and William Bryan of the other part, together with the certificate of the acknowledgement thereof, was produced in court and ordered to be recorded.

Teste: CAVE JOHNSON, *C.*

MASON COUNTY, *sct:*

December Court, 1796.

This indenture of bargain and sale, from Fleming to John and William Bryan, was presented in court and ordered to be recorded.

Teste: T. MARSHALL, JR., *C. M. C.*

STATE OF KENTUCKY, *Mason County,* } *sct:*

I, W. W. Ball, clerk of the county court for the county and State aforesaid, do certify that the foregoing is a true copy of a deed from Charles Fleming to John and William Bryan, together with the certificate of acknowledgement and orders admitting same thereon, as the same appears recorded in deed book "B," pages 530, 531, & 532, Mason county court, clerk's office.

Witness my hand as clerk of said court and official seal, this 23d day of November, 1878.

[L. S.] W. W. BALL,
Clerk Mason Co. C.

411 STATE OF KENTUCKY, }
Mason County, } *sct:*

I, Garrett S. Wall, presiding judge of the Mason county court, certify that W. W. Ball, whose signature appears above, is and was at the date of his certificate above clerk of the Mason county court, and that his aforesaid attestation is in due form and by the proper officer.

Given under my hand, this November 26th, 1878.

GARRETT S. WALL,
Presiding Judge of Mason Co. C't.

STATE OF KENTUCKY, }
Mason County, } *sct:*

I, W. W. Ball, clerk of the county court for the county and State aforesaid, do certify that Garrett S. Wall, whose signature appears to the foregoing certificate, is and was at the date thereof presiding judge of the Mason county court, duly commissioned and qualified as such, and that due faith and credit is to be given to any act done by him when acting officially.

Witness my hand and official seal, this 27th day of Nov., 1878.

[L. S.] W. W. BALL,
Clerk Mason Co. C't.

412 The court thereupon sustained the objections of the defendant to the reading of the aforesaid deed, and refused to permit the same to be given in evidence to the jury, to which ruling of the court the plaintiffs at the time excepted, and still except.

The said last mentioned deed is in words and figures as follows, to wit:

This indenture, made this 8th day of August, in the year of our Lord one thousand seven hundred and ninety-four, between Charles Fleming of the one part and John Bryan and William Bryan of the other part, witnesseth: That whereas the said John and William are purchasers of and claim through Charles Marshall the quantity of thirteen thousand and three hundred acres of land, which the said Charles was entitled to have and receive of and from the said Charles Fleming for and in consideration of his, the said Charles Marshall, having located the same, and a much larger quantity of land for the said Charles Fleming, and the said John and William Bryan being entitled to receive a conveyance of the said quantity of thirteen thousand and three hundred acres of land in the place of the said Charles Marshall, and the said Charles Fleming
413 being willing to make the said conveyance of the said quantity of thirteen thousand and three hundred acres of land by deed, with a special warranty to be taken out of a survey for eigh-

teen thousand acres patented to the said Chas. Fleming for and in consideration of the premises, and for and in consideration of the sum of ten shillings, current money, to the said Charles Fleming in hand paid by the said John and William, the receipt whereof the said Charles Fleming doth hereby acknowledge, he, the said Charles Fleming, for himself and his heirs, hath bargained and sold, aliened and confirmed, and by these presents doth bargain and sell, alien and confirm to the said John Bryan and William Bryan, and their heirs and assigns forever, to hold as tenants in common, one certain tract or parcel of land containing the quantity of thirteen thousand and three hundred acres (part of a survey of eighteen thousand acres patented to the said Charles Fleming by the Governor of Virginia), situate, lying, and being in the county of Mason, on the waters of Ohio, and bounded as follows, to wit: Beginning at the east corner of William Fitzhugh's, twelve thousand acre entry, at four hickories and six white oaks standing in a bottom; thence south forty-five degrees west one thousand two hundred and eighty
414 poles to two red oaks, two dogwoods, and a maple; thence south forty-five degrees east one thousand two hundred and eighty poles to a stake; thence north forty-five degrees east two thousand and forty-five poles to a stake in the line of the said eighteen thousand acre tract; thence a direct line to the beginning. To have and to hold the said tract or parcel of land, with its appurtenances, to the said John and William Bryan, and their heirs and assigns forever, to the only proper use and behoof of them, the said John and William Bryan, and their heirs and assigns forever.

And the said Charles Fleming, for himself and his heirs, the said tract or parcel of land with its appurtenances, to the said John Bryan and William Bryan, their heirs and assignees, will warrant and forever defend against the claim of him, the said Charles Fleming, his heirs and assigns, and all claiming under him or them, will truly and faithfully by these presents.

In testimony whereof, the said Charles Fleming hath hereunto set his hand and seal, the day and year aforesaid.

Teste: CHARLES FLEMING. [SEAL.]

We, justices of the peace for the county of Woodford, do
415 certify that Charles Fleming, whose name is signed to the preceding deed of conveyance, acknowledged the same in our presence to be his act and deed.

Given under our hands, this 8th day of August, 1794.

JOHN CRITTENDEN. [SEAL.]
MARQUIS CALMER. [SEAL.]

Woodford Court of Quarter Sessions. September Term, 1794.

This indenture of bargain and sale between Chas. Fleming of the — part and John and William Bryan of the other part, together with certificate of acknowledgement thereof, was produced in court and ordered to be recorded.

Teste: CAVE JOHNSON, *C.*

MASON COUNTY, *set:*

Dec. Court, 1796.

This indenture of bargain and sale from Fleming to John and Wm. Bryan was presented in court and ordered to be recorded.

Teste: T. MARSHALL, JR., *C. M. C.*

The plaintiff then offered in evidence a certified transcript from the Mason circuit court of the proceedings and papers in the case of Cary L. Clark against Jos. Conkling and others.

416 To the reading of which the defendants objected.

STATE OF KENTUCKY:

Mason Circuit Court, August Term, 1810.

Pleas at the court-house in the town of Washington, county of Mason, and Commonwealth of Kentucky, on Wednesday, the 22d day of August, 1810, before the Honorable William McClung, circuit judge, and the Honorable Miles W. Conway, assistant judge of the Mason circuit court.

Be it remembered that heretofore, to wit, on the 13th day of June, in the year 1798, Cary L. Clarke procured of the clerk of the late Washington district court a subpœna in chancery against Joseph Conkling, Jun'r., and William Loyd, Abigal Loyd, Betsy Loyd, and Thomas Loyd, heirs and representatives of Samuel P. Loyd, deceased, in the words following, to wit:

The Commonwealth of Kentucky to the sheriff of Mason county, Greeting:

You are hereby commanded to summon Joseph Conkling, Jun'r, and William Loyd, Thomas Loyd, Abagail Loyd, Betsy Loyd, and Thomas Loyd, heirs and representatives of Samuel P. Loyd, deceased, to appear before the judges of the Washington district court, at the court house thereof, in the town of Washington, on the third dad

417 of their next June term, to answer a bill in chancery exhibited against them by Carey L. Clarke, and this they shall in no wise omit under the penalty of $100 each; and have them there this writ.

Witness Francis Taylor, clerk of the said court, at the court house aforesaid, the 13th day of June, 1798, and the 7th year of the Commonwealth.

FRANCIS TAYLOR."

On which writ the sheriff made his return, in the following words, to wit:

"No inhabitant of this Commonwealth.

JAS. DOBYNS, *D. S.*"

At a court held for the Washington district, at the court house thereof, in the town of Washington, on the 20th day of June, in the year 1798," it appearing to the satisfaction of the court that the defendants are not inhabitants of this Commonwealth, on motion of

plaintiff, by his attorney, it is ordered that the said defendants appear here on the third day of the next term and answer the complainants' bill, and that a copy of this order be inserted in the Kentucky Gazette or Kentucky Herald for two months successively, another posted at the door of the court house of Mason county,
418 and that this order be published some Sunday, immediately after divine service, at the door of the Baptist meeting-house in Washington." At the rules held in the clerk's office of the Washton district court, on the third Wednesday in the month of June, July, August, September, October, and November, in the year 1798 aforesaid, this cause was continued.

At the rules held in the clerk's office on the third Wednesday in December, in the year aforesaid, came the complainant, by his attorney, and filed in the said office his bill in the following words, to wit:

"To the honorable the judges of the district court, held in Washington:

Humbly complaining, sheweth unto your honors your orator, Carey L. Clarke, that on the 29th day of August, 1795, Samuel Sackett, of the city of New York, sold to Joseph Conkling, Jun'r, and Samuel P. Lloyd, of the same place, two certain tracts of land situate in Mason county, in the Commonwealth of Kentucky, the one tract containing twenty thousand acres, patented to Charles Fleming, and bounded as follows, to wit: Beginning at the south corner of an entry in the name of General James Wilkinson and Co., of 37,256, at two white oaks and three black oaks; thence south forty-five degress west two thousand five hundred and sixty poles,
419 crossing several waters to three black oaks and sour-wood; thence north forty-five degrees west one thousand two hundred and fifty poles, crossing several waters to six white oaks; thence north forty-five degrees east two thousand five hundred and sixty poles, crossing several waters to two white oaks, two black oaks, and two sour-woods; thence south forty-five degrees east one thousand two hundred and fifty poles, crossing several waters, to the beginning. The other containing eight thousand three...undred and thirty-four acres, being part of a tract of eighteen thousand acres, which was patented to the said Charles Fleming, and is bounded as follows, to wit: Beginning at the east corner of William Fitzhugh's twelve thousand acre entry at four hickories and six white oaks standing in a bottom; thence south forty-five degrees west one thousand and two hundred and eighty poles, crossing branches to two red oakes, two dogwoods, and a maple; thence south forty-five degrees east two thousand two hundred and fifty poles, crossing branches to five white oaks; thence north forty-five degrees east one thoasand two hundred and eighty poles, crossing branches to a stake; thence north forty-five degrees west two thousand two hundred and fifty poles, crossing branches, to the beginning, which said eight
420 thousand three hundred and thirty-four acres, part of the above tract, is bounded as follows, to wit:

Beginning at the most southerly corner of the said tract at the

said five white oaks; thence north 45 degrees east one thousand two hundred and eighty poles to a stake; thence north forty-five degrees west from the said two last-mentioned bounds so for as to include the said eight thousand three hundred and thirty-four acres, for the sum of two thousand eight hundred and thirty pounds twelve shillings, currency of the State of New York, and as a security for the payment of the said sum of money the said Joseph Conkling, Junior, and Samuel P. Loyd on the said day executed their indenture of mortgage, with the following condition annexed, besides the usual clause of redemption: That if the said Joseph Conkling, Junior, and Samuel P. Loyd should not pay the said sum of two thousand eight hundred and thirty-three pounds twelve shillings at the time mentioned in the bonds given for the same, that the said Samuel Sackett should sell and convey the said lands at public vendue or auction at the city of New York, or in the State of Kentucky, at the town of Lexington, to the highest bidder, after advertising the same
421 for thirty days in a public newspaper and giving thirty days' notice of the time and place of sale to the said Joseph Conkling, Junior, and Samuel P. Loyd, or one of them, their, or one of their, heirs, executors, administrators, or assigns, in case they reside in the said city of New York, and make a general warranty deed to the highest bidder in the name of the said Joseph Conkling, Junior, and Samuel P. Lloyd, or one of them, or in his own name as attorney-in-fact for them; all of which will more fully appear by the said indenture of mortgage annexed to this bill, and which your orator prays may be considered as a part thereof.

Your orator further shews that the said Joseph Conkling, Junior, and Samuel P. Lloyd, not having paid the said sum of money agreeably to the tenor of the said mortgage and bonds, the sale of the said lands was *only* advertised and notice given according to the terms of the said mortgage, and they were sold at public sale in the city of New York, and your orator became the purchaser for the sum of two thousand two hundred and sixty-six dollars and seventy-two cents.

And your orator further shews that the said Samuel Sackett conveyed the same to your orator by virtue of the authority of — by deed bearing date the first day of July, 1797; all which will
422 more fully appear by reference to the said deed, which your orator annexes to this bill and prays that it may be considerd as a part thereof.

Your orator further shews that before the sale of the said land the said Samuel P. Lloyd had departed this life, leaving Wm. Lloyd, Thos. Lloyd, Abigail Lloyd, Betsy Lloyd, and Thomas Lloyd his heirs and representatives, all of whom he prays may be made defendants to this bill of complaint, by virtue of which event it is supposed that the authority given to the said Samuel Sackett to sell was revoked as to Sam'l P. Lloyd's part. In consequence of which the said Samuel Sackett, by his deed bearing date the said first day of July, 1797, assigned the before-mentioned indenture of mortgage to your orator, which deed of assignment your orator annexes to this bill, and prays that it may be considered as a part thereof.

Your orator further shows that the said Samuel P. Lloyd, before

his death, now the defendants, since his death, have not paid to him the said sum of money intended to be secured by the said mortgage, to wit, one thousand four hundred and sixteen pounds sixteen shillings, curr's of New York, on or before the 28th day of
423 May, 1796, and the like sum on or before the 28th day of May, 1797, or any part thereof, at either of those times or since; but combining, &c., have refused so to do, all which actings, &c., are contrary to equity, &c. In tender consideration whereof and forasmuch as your orator is remedyless at common law, to the end thereof that the said defendants may be compelled upon their corporal oaths, true and perfect answers to make to all and singular the premises, as fully as if the same were here again repeated and interrogated, and that the said defendants may be compelled to pay to your orator one equal half, the said sum of 2,833 12 0, New York curr'y, to wit, the sum of 1,416 16 0, like money, on a short day to be fixed by this court, or, that on failure thereof the said defendants and all claiming by, from, or under them be forever barred and foreclosed of and from all equity of redemption in and to the mortgaged premises, and every part and parcel thereof, and that your orator may receive such other and further relief as to equity and good conscience belongs. May it please your honors, the premises considered, to grant to your orator the Commonwealth writ of subpœna, &c.

J. HUGHES,
Att'y for Compl't.

And thereupon time is given the defendants to answer thereto.
424 At the rules held in the clerk's office, in January, in the year 1799, this cause is continued for answer.

At the rules held in the clerk's office, in February, in the year aforesaid, came the complainant, by his attorney, and on his motion his bill bill is taken *pro confesso*.

At the rules held in the clerk's office, in March, in the year last aforesaid, came the complainant, by his attorney, and on his motion this cause is set for hearing at the next court.

At a court continued and held for the Washington district, at the court-house in Washington, on the 24th day of November, in the year 1798:

The defendants not having entered their appearance agreeably to an act of Assembly and the rules of this court, and it appearing to the satisfaction of the court that they are not inhabitants of this Commonwealth, on the motion of the complainant, by his attorney, it is ordered that the defendants appear here, on the third of our next term, and answer the complainant's bill, and that a copy of this order be inserted in the Kentucky Gazette or Herald for
425 two months successively, another posted at the door of the court-house of Mason county, and that the order be published some Sunday at the door of the Baptist meeting-house, in Washington.

At which time, to wit, at a court continued and held for the Washington district, at the court-house thereof, on the 19th day of June,

in the year aforesaid, "came the complainant, by his attorney, and all and singular the papers and exhibits being heard, the complainant's bill is taken as confessed; and on the motion of the complainant, it is decreed and ordered that unless the defendants do pay the said equal moiety of the sum of two thousand eight hundred and thirty-three pounds twelve shillings, New York currency, to wit, one thousand four hundred and sixteen pounds sixteen shillings of the value of one thousand and sixty-two pounds twelve shillings, Kentucky currency, in the bill and mortgage mentioned, to the said complainant, on or before the nineteenth day of November, in the present year, with lawful interest, to the said time of payment, that the said defendants shall be forever barred and foreclosed of and from all equity of redemption in and to the several tracts of land in the bill and mortgage mentioned."

426 At a court held for the Washington district, at the court-house of ———, on the 20th day of November, in the year last aforesaid—

"By consent, it is ordered that this suit be continued until the next term."

At which time (to wit), at a court continued and held for the Washington district, at the court-house, in the town of Washington, before the Honorable John Coburn, judge, on the 8th day of February, in the year 1800, "The defendants, William Loyd, Thomas Loyd, Abigail Loyd, Betsy Loyd, and Thomas Loyd, heirs and representatives of Samuel P. Loyd, deceased, not having paid to the complainant the sum of fourteen hundred and sixteen pounds, sixteen shillings, New York currency, either on or before the nineteenth day of December last, as they were decreed and ordered to do by the interlocutory decree, entered up in this cause, it is now decreed and ordered that unless the defendants do pay to the complainant the said sum of £1,416 16 0, New York currency, of the value of one thousand and sixty-two pounds twelve shillings Kentucky currency, with lawful interest to the time of payment on or before the first day in March, in the present year, that they be foreclosed of and from all equity of redemption in and to the several tracts of two thousand acres, and eight thousand three hundred and

427 four acres of land in the bill and mortgage mentioned. And it is further decreed and ordered that John Graham, Winslow Parker and Lewis Bullock, gentlemen, be appointed commissioners, who, or any two of them, shall sell the interest of the said defendants in and to the said tracts of land for the best price that can be got for the same, either for cash or on credit, as they shall think best, taking, if they shall sell on credit, bond, with good security to the complainant for the purchase money, and giving two months' notice in the Kentucky Gazette, and at the door of this court-house, of the time and place of sale, and make report to the third day of this court, and it is ordered that the question of costs be reserved until the said report is made."

At a court continued and held for the Mason circuit, at the court-house thereof, in the town of Washington, on Wednesday, the 22d day of November, 1809, before the Honorable William McClung,

circuit judge of the Mason circuit, and Miles W. Conway, assistant judge, "It appearing that this suit, which was depending in the late Washington district court, has been taken off the docket before a final decree had been rendered therein, on the motion of the complainant, by his attorney, it is ordered that the said cause be
428 redocketed and continued until the next term."

At which time (to wit), at a court held for the Mason circuit at the court-house thereof, on Friday, the 25th day of May, in the year 1810, "this cause is continued."

At a court continued and held for the Mason circuit, at the court-house thereof, in the town of Washington, on Wednesday, the 22d day of August, in the year last aforesaid, before the Honorable William McClung, circuit judge, and Miles W. Conway, assistant judge, came the complainant by his counsel, and the commissioners appointed by an interlocutory order of the Washington district court, having on the nineteenth day of July, 1802, made the following report, to wit:

"Washington District Court.

CARY L. CLARK, Complainant,
against
JOSEPH CONKLING, JUN., WILLIAM LLOYD, THOMAS LLOYD, ABIGAIL LLOYD, BETSY LLOYD, THOMAS LLOYD.

Pursuant to a decree of the said court in the above cause, we, the subscribers, commissioners appointed for that purpose, attended at the court-house door in the town of Washington, and county of Mason, agreeable to public notice given in the Kentucky Gazette, and at the door of said court-house, and proceeded to sell at public sale the lands in the bill and mortgage mentioned, when the
429 above complainant became the highest bidder, and the land was sold to him for three hundred dollars.

Given under our hands and seals, this nineteenth day of July, 1802.

WINSLOW PARKER. [SEAL.]
LEWIS BULLOCK. [SEAL.]

And it appearing to the court that no final decree was entered in the said district court, or has been since entered in this court, it is now decreed and ordered that the defendants, Wm. Lloyd, Thomas Lloyd, Abigail Lloyd, and Betsy Lloyd, heirs and representatives of Samuel P. Lloyd, deceased, be forever barred and foreclosed of and from all equity of redemption in and to the two tracts of land in the bill and mortgage mentioned, to wit: Of 20,000 acres by the following boundary, to wit: Beginning at the south corner of an entry in the name of Gen'l James Wilkinson & Co., of 37,256 acres, at 5 white oaks and three black oaks; thence south 45° west 2,560 poles, crossing several waters to three black oaks and sour-wood; thence north 45° west 1,250 poles, crossing several waters to six white oaks; thence north 45° east 1,250 poles, crossing several waters to the beginning. Also one other tract of 8,334 acres, part

of a tract of 18,000 acres, by the following boundary, (to wit:) Beginning at the most southwardly corner of the said
430 18,000 acre tract at five white oaks; thence north 45° east 1,280 poles, to a stake; thence north 45° west, from the said two last mentioned bounds so far as to include the said 8,334 acres.

And it is further decreed and ordered that the said defendants do, on or before the first day of September next, convey and release to the complainant (who became the purchaser at the sale) all their interest of, in, and to the said two tracts of land. And it is further decreed and ordered that the complainant recover of the defendants the sum of £1,062½12 0 Ky. curr'y, with lawful interest thereon to the time of payment, after deducting therefrom three hundred dollars, the amount for which the lands were sold on the 19th day of July, 1802, and that the complainant recover of the defendants the costs of this suit; and the complainant discontinues this suit as to Joseph Conkling, Junior."

The following are the exhibits that were admitted and read as evidence on the trial of this cause, to wit:

"This indenture, made the twenty-ninth day of August, in the year of our Lord one thousand seven hundred and ninety-five, between Joseph Conkling, Junior, and Samuel P. Lloyd, of the
431 city of New York, of the first part, and Samuel Sackett, of the same city of the second part, witnesseth: That whereas the parties of the first part in and by their two several bonds or obligations duly executed and bearing even date with these presents, stands held and firmly bound unto the said party of the second part in the one bond in the penal sum of two thousand eight hundred and thirty-three pounds twelve shillings, with a condition thereunder for the payment of the sum of one thousand four hundred and sixteen pounds sixteen shillings, current money of the State of New York, on or before the twenty-eighth day of May, in the year of our Lord one thousand seven hundred and ninety-six, and in the other bond in the like penal sum of two thousand eight hundred and thirty-three pounds twelve shillings, with a condition thereunder written for the payment of the sum of one thousand four hundred and sixteen pounds sixteen shillings, like current money of the State of New York, on or before the twenty-eighth day of May, in the year of our Lord one thousand seven hundred and ninety-seven, as in and by the said several bonds or obligations, and the condition thereunder written, reference being thereto had may more fully and at large appear. Now, therefore, this indenture witnesseth, that the said parties
432 of the first part, for the better securing of the sums mentioned in the conditions of the said bonds, and also in consideration of the sum of ten shillings to the said parties of the first part, in hand paid by the said party of the second part, have granted, bargained, sold, aliened, remised, released, enfeoffed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, enfeoff, and confirm unto the said party of the second part (in his actual possession now being by virtue of a

lease for one year, bearing date the day before the day of the date of these presents), and to his heirs and assigns forever, all those two certain tracts, pieces, and parcels of land, situate lying, and being in the late commonwealth of Virginia, now State of Kentucky, in the late county of Mason, and on the waters of the Ohio, the one tract containing twenty thousand, being patented to Charles Fleming by the said Commonwealth of Virginia, and bounded as follows, to wit: Beginning at the south corner of an entry in the name of General James Wilkinson and Company, of thirty-seven thousand two hundred and fifty-six acres, at five white oaks and three black oaks; thence south forty-five degrees west two thousand five hundred and sixty poles, crossing several waters, to three
433 black oaks and sour-wood; thence north forty-five degrees west one thousand two hundred and fifty poles, crossing several waters, to six white oaks; thence north forty-five degrees east two thousand five hundred and sixty poles, crossing several waters, to two white oaks, two black oaks, and two sour-woods; thence south forty-five degrees east one thousand two hundred and fifty poles, crossing several waters to the beginning. The second of the said tracts, containing eight thousand three hundred and thirty-four acres, and being a part of a tract of eighteen thousand acres, is patented to the said Charles Fleming, and bounded as follows, to wit: Beginning at the east corner of William Fitzhugh's twelve thousand acre entry at four hickories and six white oaks standing in a bottom; thence south forty-five degrees west one thousand two hundred and eighty poles; crossing branches to two red oaks, two dogwoods, and a maple; thence south forty-five degrees east two thousand two hundred and fifty poles, crossing branches to five white oaks; thence north forty-five degrees east one thousand two hundred and eighty poles, crossing branches to a stake; thence north forty-five degrees west two thousand two hundred and fifty poles, crossing branches to the beginning, which said eight thousand three hundred and thirty-four acres are bounded as follows, to wit:

434 Beginning at the most southerly corner of the said last-mentioned tract of land at the said five white oaks, thence north forty-five degrees east one thousand two hundred and eighty poles to a stake, thence north forty-five degrees west from the said two last-mentioned bonds so far as to include the said eight thousand three hundred and thirty-four acres, and containing, with the said first mentioned tract, twenty-eight thousand three hundred and thirty-four acres, together with all and singular the rights, members, hereditaments and appurtenances to the same belonging, or in any wise appertaining, and all the estate, rights, title, and interest of the said parties of the first part, of, in, and to the same, and of, in, and to every part and parcel thereof, to have and to hold to the said party of the second part, his heirs and assigns forever; provided, always, nevertheless, and it is the true intent and meaning of the parties to these presents, that if the said parties of the first part, their executors or administrators, shall well and truly pay unto the said party of the second part, his executors, administrators, or assigns,

the said several sums of money mentioned in the conditions of the before recited bonds, according to the true intent and meaning thereof, at the times specified for the payment thereof, that then and from thenceforth these presents and everything herein contained, shall cease, determine, and be absolutely void; otherwise, shall stand, be, and remain in full force and virtue *is*, and the said parties of the first part for themselves and their heirs, jointly and severally, hereby authorize and fully empower the said party of the second part, his executors, administrators, and assigns, if the said parties of the first part shall neglect, delay, or refuse to pay the said sums mentioned in the conditions of the said bonds, to sell and convey the same at public vendue or auction, at the city of New York, or in the State of Kentucky, at the town of Lexington, to the highest bidder, after advertising the same for thirty days in a public newspaper, and giving thirty days' notice of the time and place of sale to the said parties of the first part, or one of them, their, or one of their heirs, executors, administrators, or assigns, in case hey reside in the said city of New York, and to make a warranty deed to such highest bidder in our or one of our names, or his name as attorney as aforesaid, and attorneys under him for the purpose aforesaid, to make and constitue and again at pleasure to revoke, and out of the moneys for which the said land is sold at such vendue or auction, to deduct the moneys and interest thereof due on the before-mentioned bonds, with the expenses of such sale, and return the overplus to the said parties of the first part on their demanding the same.

In witness whereof, the parties to these presents, have hereunto set their hands and seals, the day and year above written.

JOSEPH CONKLING, JUN'R. [SEAL.]
SAM'L P. LLOYD. [SEAL.]

We, John Campbell and Wynant Vanzandt, Esq'rs, two of the aldermen and justices of the peace of the city and county of New York, in the State of New York, do hereby certify that on the thirty-first day of August, in the year of our Lord one thousand seven hundred and ninety-five, personally appeared before us the within-named Joseph Conkling, Jun'r, and Sam'l P. Lloyd, who reside in the said city of New York, and having signed, sealed, and acknowledged the within mortgage in our presence, acknowledged that they executed the same for the uses and purposes therein mentioned, and we finding no material erasures or interlineations, do allow the same to be recorded.

As witness our hands.

WYNANT VANZANDT,
Ald. & Justice of the Peace.
JOHN CAMPBELL,
Ald. & Justice of the Peace.

CITY AND COUNTY OF NEW YORK, *ss:*

I, Robert Benson, clerk of the city and county of New York, in the State of New York, do hereby certify that Wynant Vanzandt

and John Campbell are aldermen and justices of the peace in the said city, county, and State, and that due faith and credit is to be given to any act done by them when acting in their official character.

In witness whereof I have hereunto affixed the seal of the said county, and subscribed my name, this thirty-first day of August, in the year of our Lord one thousand seven hundred and ninety-five.

[L. S.] ROBT BENSON, *Clk.*

At a court held for Mason county, the 22d of Dec'r, 1795, this mortgage from Conkling and Loyd to Sackett was presented in court and ordered to be recorded.

Teste: T. MARSHALL, JR., *C. M. C.*

Deed. Sackett to Clarke.

"This indenture, made the first day of July, in the year of our Lord one thousand seven hundred and ninety-seven, between Joseph Conkling, Junior, of the city of New York, merchant,
438 in his own right) and the said Joseph Conkling, Junior, survivor of Joseph Conkling, Junior, and Samuel P. Lloyd, of the city of New York, by Samuel Sackett, of the said city, his and their agent and attorney, of the first part, and Cary L. Clarke, late of the said city, but now of the town of Georgetown and State of Kentucky, of the second part, witnesseth:

That whereas the said Joseph Conkling, Junior, and Samuel P. Lloyd did, on the ninth day of August, one thousand seven hundred and ninety-five, duly execute and acknowledge to the above-named Samuel Sackett their indenture of mortgage on the tract of land hereinafter mentioned, to secure the payment of a part of purchase-money mentioned in two several bonds, to wit, one bearing date with the said mortgage in the penal sum of two thousand eight hundred and thirty-three pounds twelve shillings, with a condition thereunder written for the payment of one thousand four hundred and sixteen pounds sixteen shillings, on or before the twenty-eighth day of May, one thousand seven hundred and ninety-six, and the other bond, bearing the like date, in the like penal sum, conditioned for the payment of the like sum of one thousand four hundred and sixteen pounds sixteen shillings, on or before the twenty-eighth
439 day of May, in the year of our Lord one thousand seven hundred and ninety-seven, in which said indenture of mortgage the said Joseph Conkling, Junior, and Samuel P. Lloyd did sell and convey the said hereinafter-mentioned premises to the said Samuel Sackett, with a condition contained in the body of the said indenture, that in case the said several sums of money mentioned in the conditions of the said bonds were duly paid at the days therein specified, that then the said indenture of mortgage and everything therein contained should be void; and the said Joseph Conkling, Junior, and Samuel P. Lloyd did also in the said indenture of mortgage, for themselves and their heirs, jointly and severally, authorize and fully empower the said Samuel Sackett, if they

should delay or refuse to pay the said sums mentioned in the condition of the said bonds, to sell the said premises at public vendue, in the city of New York, to the highest bidder, after advertising the same in a public newspaper and giving thirty days' notice of the time and place of sale to the said parties, or one of them, and to make a warranty deed in their, or one of their, or his name, to said highest bidder, as in and by the said indenture of mortgage, reference being thereto had, will more fully and at large appear;

440 And whereas the said Samuel P. Lloyd is since dead, and the said last-mentioned bond, dated the twenty-eighth day of May, in the year of our Lord one thousand seven hundred and ninety-five, in the penal sum of two thousand eight hundred and thirty three pounds twelve shillings, conditioned for the payment of the sum of one thousand four hundred and sixteen pounds sixteen shillings on or before the twenty-eighth day of May, in the year of our Lord one thousand seven hundred and ninety-seven, was not duly paid or satisfied, or the said sum of one thousand four hundred and sixteen pounds sixteen shillings, or any part thereof, duly paid to the said Samuel Sackett on or before the said day specified for the payment thereof, according to the true intent and meaning of the said parties, and of the condition of the said bond and of the said indenture of mortgage.

And whereas the said Samuel Sackett did, on the thirtieth day of May, in the year of our Lord one thousand seven hundred and ninety-seven, advertise the same for public sale, at public vendue or auction in the city of New York, to the highest bidder, and did advertise the same in a public newspaper for thirty days previous to the day appointed for such sale, and did also give notice to

441 the said Joseph Conkling, Junior, of the time and place of such sale thirty days previous to such sale; and whereas the above-named Cary L. Clarke was the highest bidder at such sale, and did then and [there] bid the sum of eight cents per each acre of the said land, and did therein and thereby purchase the same at the said vendue or auction at the said price:

Now, therefore, this indenture witnesseth, that the said Joseph Conkling, Junior, for himself, and as survivor of the said Joseph Conkling, Junior, and Samuel P. Lloyd, and the said attorney and agent, Samuel Sackett, in virtue of the powers in the said Samuel Sackett vested in and by the said indenture of mortgage, and in consideration of the sum of two thousand two hundred and sixty-six dollars seventy-two cents, being the amount of the said land at eight cents per each acre thereof, to the said Samuel Sackett in hand well and truly paid by the said Cary L. Clarke, the receipt whereof is hereby acknowledged, to and for the use of the said Joseph Conkling, Junior, and Samuel P. Lloyd, to be by the said Samuel Sackett applied toward the payment of the said sum of money due to him, have, and by these presents do, grant, bargain, sell alien, remise, release, enfeoff, and confirm unto the [said] Cary L. Clarke, and and to his heirs and assigns forever, all those two certain tracts

442 pieces and parcels of land situate, lying, and being in the Commonwealth of Virginia, now State of Kentucky, in the

late county of Mason, and on the waters of the Ohio, the one tract containing twenty thousand acres, being patented to Charles Fleming by the said Commonwealth of Virginia, and bounded as follows, to wit: Beginning at the south corner of an entry of General James Wilkinson and Company of thirty-seven thousand two hundred and fifty-six acres, at five white oaks and three black oaks; thence south forty-five degrees west two thousand five hundred and sixty poles, crossing several waters, to three black oaks and sour-wood; thence north forty-five degrees west one thousand two hundred and fifty poles, crossing several waters, to six white oaks; thence north forty-five degrees east two thousand five hundred and sixty poles, crossing several waters, to two white oaks, two black oaks, and forty sour-woods; thence south forty-five degrees east one thousand two hundred and fifty poles, crossing several waters, to the beginning. The second of the said tracts containing eight thousand three hundred and thirty-four acres, and being part of a tract of eighteen thousand acres, which is patented to the said Charles Fleming, and bounded as follows, to wit: Beginning at the east
443 corner of William Fitzhugh's twelve-thousand-acre entry at four hickories and six white oaks standing in a bottom; thence south forty-five degrees west one thousand two hundred and eighty poles, crossing branches to two red oaks, two dogwoods, and a maple; thence south forty-five degrees east two thousand two hundred and fifty poles, crossing branches to five white oaks; thence north forty-five degrees east one thousand two hundred and eighty poles, crossing branches to a stake; thence north forty-five degrees west two thousand two hundred and fifty poles, crossing branches to the beginning, which said eight thousand three hundred and thirty-four acres are bounded as follows, to wit: Beginning at the most southerly corner of the said last-mentioned tract of land, at the said five white oaks, thence north forty-five degrees, east one thousand two hundred and eighty poles to a stake; thence north forty-five degrees west from the said two last-mentioned bounds, so far as to include the said eight thousand three hundred and thirty-four acres, and containing with the said first-mentioned tract, twenty-eight thousand three hundred and thirty-four acres. To have and to hold to the said Cary L. Clarke, his heirs and assigns, forever. And the said Joseph Conkling, Junior, for himself and as survivor of the said Joseph Conkling,
444 Junior, and Samuel P. Loyd, doth hereby, for himself, his executors, and administrators, covenant and grant to and with the said Cary L. Clarke, his heirs and assigns, that the same now is and shall forever hereafter remain free and clear of and from all and all manner of incumbrance by him or them made thereof in any manner whatsoever, and that he, the said Joseph Conkling, Junior, and his heirs, the said tract of land and premises to the said Cary L. Clarke, his heirs and assigns, shall and will warrant and by these presents will forever defend against the lawful claim or demand of all and every person or persons whatsoever.

In witness whereof, the parties to these presents have hereunto

set their hands and seals this first day of July, in the year of our Lord one thousand seven hundred and ninety-seven.

SAMUEL SACKETT, [SEAL.]
Att'y for Joseph Conkling, Junior, and Samuel P. Lloyd.

Sealed and delivered in the presence of—
WILLIAM BROADHEAD.
WHITEHEAD KISSAM.

We, Theophilus Beckman and Robert Lenox, two of the aldermen and justices of the peace of the city and county of New
445 York, in the State of New York, do hereby certify that on the thirteenth day of July, in the year of our Lord one thousand seven hundred and ninety-seven, personally appeared before us the within-named Samuel Sackett, who resides in the said city, and acknowledges in our presence that he signed, sealed, and executed the within deed for the uses and purposes therein mentioned, and requested that the same might be recorded, as witness our hands.

THEO'S BECKMAN,
ROB. LENOX,
Ald. & Just. of Peace.

CITY AND COUNTY OF NEW YORK, *ss:*

I, Robert Benson, clerk of the city and county of New York, in the State of New York, do hereby certify that the above-named Theophilus Beckman and Robert Lenox, who have signed their names to the above certificate, are aldermen and justices of the peace in the said city, county, and State, and that due faith and credit is to be given to any act done by them when acting in their official character.

In witness whereof, I have hereunto subscribed my name and affixed my seal this fourteenth day of July, in the year of our Lord one thousand seven hundred and ninety-seven.

446 [L. S.] ROB'T BENSON, *Clerk.*

Know all men by these presents, that I, Samuel Sackett, mentioned in the hereunto annexed indenture of mortgage, in consideration of the sum of two thousand two hundred and sixty-six dollars seventy-two cents, lawful money of the United States of America, to me in hand paid by Cary L. Clarke, of the city of New York, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, and assigned, and by these presents do grant, bargain, sell, alien, remise, release, and assign to the said Cary L. Clarke, and to his heirs and assigns forever, all the right, title, and interest of the said Samuel Sackett of, in, and to the annexed indenture of mortgage, and the lands mentioned therein, and also of, in, and to all and every the bonds and obligations mentioned therein. And I, the said Samuel Sacket, do further authorize and empower the said Cary L. Clarke to take all legal ways and means in my name or his name, or in any other name or names, to obtain the said lands, or to obtain the moneys due thereon and thereby, and when so obtained to apply the same to his own use,

and one or more attorneys under him, for the purpose afore-
447 said, to make and constitute, and again at pleasure to revoke, hereby ratifying and confirming whatever he or his substitutes shall legally do in and about the premises.

In witness whereof, I have hereunto set my hand and seal, the first day of July, in the year of our Lord one thousand seven hundred and ninety-seven.

SAMUEL SACKETT. [SEAL.]

Sealed and delivered in the presence of—
WHITEHEAD KISSAM.
WILLIAM BRODHEAD.

We, Theophilus Beckman and Robert Lenox, two of the alderman and justices of the peace of the city and county of New York, in the State of New York do hereby certify that on the 13th day of July, in the year of our Lord one thousand seven hundred and ninety-seven, pesonally appeared before us the within-named Samuel Sackett, who resides in the said city, and acknowledged in our presence that he signed, sealed, and executed the within deed for the uses and purposes therein mentioned, and requested that the same might be recorded.

Witness our hands.

THEOS. BECKMAN,
ROB. LENOX.
Ald. & Justices of Peace.

CITY AND COUNTY OF NEW YORK, *ss:*

448 I, Robert Benson, clerk of the city and county of New York, in the State of New York, do hereby certify that the above-named Theophilus Beckman and Robert Lenox, who have signed their names to the above certificate, are aldermen and justices of the peace in the said city, county, and State, and that due faith and credit is to be given to any act done by them when acting in their official character.

In witness whereof, I have hereunto subscribed my name and affixed my seal, this fourteenth day of July, in the year of our Lord one thousand seven hundred and ninety-seven.

[SEAL.] ROBT BENSON, *Clerk.*

STATE OF KENTUCKY, *sct:*

Mason Circuit Court.

I, Thomas A. Respess, clerk of the Mason circuit court, do certify that the foregoing thirty-nine and one-third pages of writing contain a full, true, and complete transcript of the record and proceedings in the action therein mentioned, as the same appears on file and on record in my office.

In testimony whereof, I, Tho. A. Respess, clerk as aforesaid,
449 have hereunto set my hand and affixed the seal of said court. Done at Maysville, Kentucky, the 27th day of November, 1878.

THOS. A. RESPESS, *Clerk.*

I, Geo. M. Thomas, judge of the fourteenth judicial district, which includes the Mason circuit court, do hereby certify that Thomas A. Respess, whose certificate appears above, was at the time he made said certificate the clerk of the Mason circuit court, and that his attestation aforesaid is in due form, and his signature thereto genuine.

Given under my hand, as judge as aforesaid, this 28th day of November, 1878.

GEO. M. THOMAS, *Judge, &c.*

And thereupon the plaintiff produced the assistant librarian of the public library of Lexington, 21 years of age, having with him printed newspapers, which appeared to be of great age, and which purported to be the original files for the years 1778 & 1779 of the newspaper called the Kentucky Gazette, published weekly, and plaintiffs showed in nine successive issues of said newspaper weekly publications, beginning with December 12th, 1798, and end-
450 ing with February 7th, 1799, of an advertisement in words and figures as follows, to wit:

STATE OF KENTUCKY, *Washington District:*

November Term, 1798.

CARY L. CLARK, Complainant,
against
JOSEPH CONKLING, Jr., and WILLIAM LLOYD, THOMAS Lloyd, Abigail Lloyd, Betsy Lloyd, Thos. Lloyd, heirs and representatives of Sam'l P. Lloyd, deceased, defendants. } In Chancery.

The defendants, not having entered their appearence agreeably to an act of Assembly and rules of this court, and it appearing to the satisfaction of the court that they are not inhabitants of this Commonwealth, on the motion of he complainant, by his attorney, it is ordered that the defendants appear here on the third day of our next term and answer the complainants' bill; and that a copy of this order be inserted in the Kentucky Gazette or Herald for two months, successively; another posted at the door of the court-house of Mason county; and that this order be published some
451 Sunday at the door of the Baptist Meeting-house, in Washington.

A copy. Teste: FRANCIS TAYLOR, *C. W. D. C.*

Published Dec. 12th, 19th, 26th, y'r 1798; Jan'y 2d, 9th, 16th, 24th, 31st; Feb'y 7th, y'r 1799.

And thereupon the court sustained the objection of the defendants and refused to permit the said — of said records to be given in evidence to the jury; to which ruling of the court the plaintiffs at the time excepted, and still except.

And plaintiffs pray that the foregoing may be sealed, signed, enrolled, and made part of the record as their bill of exceptions.

JOHN W. BARR, [SEAL.]
Judge.

152 Circuit Court of the United States for the District of Kentucky, (at Covington.)

KATE APPLEGATE *et al. vs.* LEX. & CARTER CO. R. R., &c.

I, Henry Bostwick, clerk of the circuit court of the United States for the district of Kentucky (at Covington), hereby certify the foregoing four hundred and fifty-one pages contain a true and complete transcript of the above-entitled cause as the same is now on record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, this 11th day of October, A. D. 1881.

[SEAL.]

H. BOSTWICK,
Clerk Cir. Ct. K'y Dist.
By JOHN F. PURCELL.

Endorsed on cover: Kentucky C. C. U. S. No. 134. Kate Applegate, William Applegate, Harriet B. Clark, Charlotte Hollingsworth, Martha O. Clark, and James Clark, plaintiffs in error, *vs.* The Lexington and Carter County Mining Company, The Norton Iron Works, The Eastern Kentucky Railway Company, W. W. Culbertson, Thomas W. Means, and K. R. Culbertson, partners as Culbertson, Means, and Culbertson; Charles Corner, John Bayes, and Samuel T. Moore. Filed 19th October, 1882.

117-225

RECEIVED
JAN 11 1886
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

KATE APPLEGATE et al.,
Plaintiffs in Error,

vs.

THE LEXINGTON AND CARTER COUNTY MINING COMPANY et al.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Brief for Plaintiffs in Error.

DAVID W. ARMSTRONG,
120 Broadway,
New York.

W. W. HELM,
DAVID W. ARMSTRONG,
Attorneys for Plaintiffs.

NEW YORK:
DOUGLAS TAYLOR, LAW PRINTER, 89 NASSAU STREET, Cor. FULTON.
1885.

Supreme Court of the United States.

KATE APPLEGATE *et al.*,
Plaintiffs in Error,

vs.

THE LEXINGTON AND CARTER COUNTY MINING COMPANY *et al.*

BRIEF FOR PLAINTIFFS.

Statement.

The plaintiffs in error, also plaintiffs below, suing as the heirs-at-law of Carey L. Clark, deceased, brought their action at law for the recovery of eight thousand three hundred and odd acres of land, situated within the present limits of the counties of Greenup, Carter and Boyd, in the State of Kentucky.

The petition alleges, in substance, that Carey L. Clark died seized in fee simple of the land in question; that he derived title thereto by a regular and unbroken chain from Charles Fleming, the patentee thereof; that the land now belongs to the plaintiffs and that they are entitled to the possession thereof, and that the defendants have unlawfully entered on said land, and now wrongfully withhold the possession of the same from the plaintiffs. (*Pr. rec. p.* 6.)

By an amended petition, mistakes in the corporate names of certain of the defendants (railroad companies and furnace and mining companies) were corrected. (*Pr. rec., p.* 16.)

The defendants answered separately, and by averments of no "knowledge or information," the respective answers, each puts in issue the citizenship of the plaintiffs, as affecting the jurisdiction of the Court, and also, under the same form of traverse, puts the plaintiffs on proof as to the fact that they are the heirs-at-law of Carey L. Clark. The answers further assert title in the defendants, through various patents, some younger and some older than the Fleming, which they allege cover the land in controversy.

Attempts to plead the Statute of Limitation, and a denial of title in the plaintiffs, are the further defenses on which the defendants rely. (*Pr. rec., pp.* 10, 12, 15, 16, 17, 22.)

Replies and Amended Replies, wherein the plaintiffs controvert the allegations of title in the defendants, by possession or otherwise, and deny, by apt averments, that their cause of action is barred by limitation, comprise the remaining pleadings in the case. (*Pr. rec., pp.* 27, 28, 29, 30, 32, 34, 36.)

No question connected with the pleadings is now presented for consideration, and of the issues made in the case, the only one that has any pertinence on this hearing is that of the title of the plaintiffs. The trial below, before the Hon. John W. Barr, District Judge, was limited to the effort on the part of plaintiffs to introduce evidence of their title, and to the rejection thereof by the Court, and to a verdict by the jury in favor of the defendants, under a peremptory instruction from the Court, after such rejection of the evidence offered by the plaintiffs. (*Pr. rec., p.* 44.)

The only portions of the record material to the present inquiry, therefore, are to be found from page 45 to the close, beginning with the Bill of Exceptions on said first-named page.

The Title of Plaintiffs as Offered.

The title of the plaintiffs, so far as adduced on the trial below, consisted of the following papers:

1. Copy, duly certified from the Land Office of the State of Kentucky, of the patent from the State of Virginia to Charles Fleming, for the tract of land of which the land in controversy was originally a part. (*Pr. rec.*, *p.* 45.)

2. Copy of the will of Charles Fleming, devising a moiety of said tract of land to William Fleming, John Bernard, Jr., and Richard Bernard, as trustees. (*Pr. rec.*, *p.* 46.)

3. A copy of a deed from Samuel Sackett and wife to Joseph Conkling and others, dated Aug. 29, 1795, for the particular land in controversy in this case, together with certain other tracts, that had been patented by the State of Virginia to Charles Fleming. (*Pr. rec.*, *p.* 50.)

4. A copy of a mortgage from Joseph Conkling and others, the grantees above named, to Samuel Sackett, the grantor above named, conveying the same lands as above, and dated Aug. 29, 1795. (*Pr. rec.*, *p.* 54.)

5. A copy of a deed from William Fleming and others, trustees as above under the will of Charles Fleming, to John Bryan, conveying to Bryan the lands devised to them by the will of Fleming, and dated December 31, 1796. (*Pr. rec.*, *p.* 58.)

6. The original of the deed last named (*Pr. rec.*, *p.* 63).

7. A copy of a deed from John Bryan and wife to Samuel Sackett, dated January 28, 1797, conveying the same land conveyed to Bryan by deed last above named. (*Pr. rec.*, *p.* 177.)

8. The original of the deed last above named. (*Pr. rec.*, *p.* 177.)

9. The original of a deed from Charles Fleming to John and William Bryan, dated Aug. 8, 1794, and conveying to said John and William Bryan, thirteen thousand three hundred acres of the land that had been patented to said Fleming by the State of Virginia, and being part of the eighteen thousand acre tract, of which tract the land in controversy in this case is also a part. (*Pr. rec.*, *p.* 180.)

10. A copy from the Mason Circuit Court, of the record in the case of Carey L. Clark against Joseph Conkling and others, in which Clark, as assignee of the above-named mortgage (No. 4) from Conkling to Sackett, brought suit for the foreclosure thereof. (*Pr. rec.*, *p.* 185.)

Assignment of Errors.

The Court admitted papers 1, 2, 3, 4, namely, the patent to Fleming, the will of Fleming, copy of the deed from Sackett to Conkling, and copy of the mortgage from Conkling to Sackett.

The other papers, offered as part of the title of the plaintiffs, 5, 6, 7, 8, 9 and 10, were rejected, and the plaintiffs now assign for error the rulings of the Court in that behalf, and also the rulings in excluding certain evidence offered by the plaintiffs in support of the competency of said papers, as follows, to wit:

1. The rejection of the copy of the deed from William Fleming and others, as trustees, to John Bryan, being No. 5 above. (*Pr. rec.*, *p.* 58.)

2. The rejection of the original of said deed, being No. 6 above. (*Pr. rec.*, *p.* 63.)

3. The rejection of the copy of the deed from John Bryan and wife to Samuel Sackett, being No. 7 above. (*Pr. rec.*, *p.* 174.)

4. The rejection of the original of said last-named deed, being No. 8 above. (*Pr. rec.*, *p.* 177.)

5. The rejection of the original of the deed from Charles Fleming to John and William Bryan, being No. 9 above. (*Pr. rec.*, *p.* 180.)

6. The rejection of the transcript of the case of Clark *vs.* Conkling, being No. 10 above. (*Pr. rec.*, *p.* 155.)

7. The rejection of the offer to prove that there was recorded in the deed book of the clerk's office of the Kentucky Court of Appeals, containing deeds recorded in the year 1816, a deed identical in terms with the deed No. 6 above, purporting to be the original of a deed from William Fleming and others to John Bryan. (*Pr. rec.*, *p.* 170.)

8. The refusal of the Court to hear read the deed recorded in book B, of the Mason County Court, purporting to be identical in terms with the original of the deed from Fleming to John and William Bryan. (*Pr. rec.*, *p.* 181.)

9. And, lastly, the plaintiffs further assign for error, the peremptory instruction of the Court to the jury to find for the defendants.

POINTS.

I.

THE COPY OF THE DEED FROM WILLIAM FLEMING AND OTHERS, TRUSTEES, TO JOHN BRYAN WAS COMPETENT AND SHOULD HAVE BEEN ADMITTED.

(*a.*) The grantors did not reside in Kentucky, and the acknowledgment and certificate were in accordance with Section 3 of the Act of December 19, 1796. This Act took effect January 1, 1797, and the deed was dated December 31, 1796, and acknowledged January 2, 1797, the second day after the Act took effect. (*See Act at close of brief.*)

It is true that the Act authorizes the acknowledgment to be made, only *before the Mayor of the city in which the grantor resides*, and neither this certificate nor the deed contains any recital on that point. In the case of *Womack* vs. *Wilson*, *Litt. Sel. Cas.* 292, this identical deed and certificate were before the Court of Appeals, and the Court ruled that a certified copy was not admissible in evidence, but rested the decision solely on the ground that the deed had not been *recorded* within the time required by law. On the point of the sufficiency of this certificate the Court say:

> "On the 31st day of December, 1796, said trustees made a conveyance to John Bryan of said tract with others. This was acknowledged before the Mayor of the City of Richmond, in the State of Virginia, on the 2d day of Janaary, 1797, and was certified by him in the usual form, with the seal of the Corporation affixed. This authentication conforms essentially to the Virginia Act of 1785, and to our Act of 1796, which follows the Act of Virginia, and entitles the deed to be recorded here."

In *McCullock* vs. *Myers*, 1 *Dana*, 522, the question was on a certificate of acknowledgment before the Mayor of Richmond, just as in this case, and the certificate *recited* that the *grantor* was a *citizen* of *another place in Virginia;* but the Court of Appeals held, notwithstanding such recital, that the Mayor's certificate was sufficient to authorize the clerk to admit the deed to record, because the fact that the acknowledgment was taken there, raised the presumption that the grantor was a *temporary resident* of Richmond, although a citizen of another place, and that such presumption of temporary residence satisfied the requirement of the act.

The early case of *Coleman* vs. *Casey*, 4 *Bibb*, 516, was decided in 1817, before either of those above cited, and holds that an authentication similar to the one now under consideration is insufficient. But this case was a construction of the Act of 1792, and without application to

acknowledgment taken. as the one now in question, under the Act of 1797.

(*b.*) The deed was not recorded until the 28th day of June, 1816, and is therefore not within the provision of the Act of 1785, which was still in force in 1816, and which required such deeds to be recorded within eighteen months from their execution (*see Act at close of brief, and Taylor* vs. *Shields*, 5 *Litt.*, 295; *Blight* vs. *Banks*, 6 *Mon.*, 196); but under § 10 of the Act of 1831, the copy of a deed, duly acknowledged, is admissible in evidence without regard to the time at which it may have been recorded, and under this last provision the copy should have been admitted. (*See Act at close of brief.*)

The Act of 1831 was construed and sustained by the Kentucky Court of Appeals in *Patterson* vs. *Hansel*, 4 *Bush.*, 654.

(*c.*) The fact that this deed was not offered in its chronological place in the chain of title is immaterial.

"The plaintiff may commence with any part of his evidence, and is not compelled to pursue any particular order in tracing his title."

Langley vs. *Jones*, 26 *Md.*, 477.

"The plaintiff, in ejectment, offered in evidence a deed from George and Leah Gale, for a moiety of a tract of land, without previously showing their title. The defendant objected to the reading of the deed in evidence until the plaintiff had shown that the grantors had a right to convey, because it was irrelevant. The Court held that the deed might be read to the jury, but that the plaintiff must show that the grantors had a right to make the conveyance, or the Court would direct the jury that the deed was not evidence."

Lowes vs. *Holbrook*, 1 *Har. & J.*, 153.

(*d.*) The relevancy of this deed, however, sufficiently appears to render it admissible as offered, from the fact that the deed from John and William Bryan to Samuel Sackett (*p.* 70, *pr. rec.*) contains a covenant of further assur-

ance. Such covenants run with the land and inure to the benefit of even remote grantees.

Colby vs. *Osgood*, 29 *Barb.*, 339.
Bennett vs. *Waller*, 23 *Ill.*, 183.
Beard vs. *Griggs*, 1 *J. J. Mar.*, 27.
Lovet vs. *Green*, 12 *Johns.*, 204.
Jackson vs. *Bull*, 1 *Johns. Cas.*, 90.

Such covenants create estoppels that are as much muniments of title as the deeds, wills or other instruments through which title is derived.

Herman on Estoppel, 292.
Carter vs. *Chaudron*, 21 *Ala.*, 91.

And on titles thus derived, by estoppel purely, ejectment may be maintained.

Stoddard vs. *Chambers*, 2 *How.*, 317.

The deed from Charles Fleming to John and William Bryan (*Pr. rec.*, *p.* 181) attempts to convey by a description that calls for *stakes* merely, and without survey, a part only, to wit, thirteen thousand acres of the original tract of eighteen thousand acres. By reason, therefore, of the covenant of further assurance in the deed from John and William Bryan to Samuel Sackett, this deed under which John Bryan acquires title to the remainder of the original tract has a bearing of the utmost force and importance on the title of the plaintiffs.

(*e.*) This deed, under the rules to be hereafter cited, is further competent, in behalf of the plaintiffs, as showing that the deed from Charles Fleming to John and William Bryan (*Pr. rec.*, *p* 183) had been "*acted on.*"

This is altogether apart from the question of *estoppel*, as connected with the *recital* which the deed contains of the execution by Charles Fleming of the deed above named, which *recital* is considered below, and which would be binding as an *estoppel* only on those claiming under the deed containing the *recital*, and on their privies.

As now presented, it is not the *recital as such* that is

relied upon, and not the *estoppel*, but it is purely the matter of *evidence* of a certain *act* done, to wit, the execution of the deed offered, and the recognition thereby by the trustees of Fleming of his previous deed as a subsisting and valid conveyance, and the consequent restriction of their own conveyance to such portion of the lands as Fleming had not already conveyed. If the *recital* were relied upon to prove the *execution* of the deed to which it relates, it would be evidence, as before said, only against those claiming under the deed in which it is contained; but the original of the deed to which the recital relates being produced, and it being, in its present phase, an inquiry whether such deed has been authenticated by being "*acted on*," *the whole of the second deed, not the recital merely, is competent evidence against the entire world as an act based on the first.* The trustees of Fleming "*acted on*" the deed which he had executed, and *their deed* constituting such action, not their *recital*, is admissible in evidence.

(*f.*) This deed contains an explicit *recital* of the execution of the deed from Charles Fleming to John and William Ryan (*Pr. rec., p.* 183), which latter deed is the direct source of the title asserted by the plaintiffs. *This recital* is binding on, and conclusive against, all persons claiming by and under the deed in which it is contained, as to the fact that the said deed from Charles Fleming to John and William Bryan was executed in accordance with the recital.

Herman on Estoppel, 251.
Carver vs. *Jackson*, 4 *Pet.*, 88.
Crane vs *Morris*, 6 *Pet.*, 598.

The chain of conveyances introduced by the plaintiffs, beginning with the report and deed of the commissioners appointed to partition the eighteen thousand acre tract between Clark and Hughes (*Pr. rec., p.* 150), and including the deeds from the Sheriff of Greenup County to

McConnell (*Pr. rec.*, *p.* 154); the deed from McConnell to James Howe (*Pr. rec.*, *p.* 156); the deed from Howe's heirs to Alexander Campbell (*Pr. rec.*, *p.* 158); the deed from Campbell to White and others (*Pr. rec.*, *p.* 160); the deed from Geo. W. Howe to Wilson, Culbertson & Co. (*Pr. rec.*, *p.* 163); the deed from John Y. Montgomery to Wilson, Baird & Co. (*Pr. rec.*, *p.* 164); the deed from James Howe to John Y. Montgomery (*Pr. rec.*, *p.* 166); and the deed from Daniel B. Howe to Wilson, Culbertson & Co., (*Pr. rec.*, *p.* 167) is a succession of transfers of the title conveyed to John Bryan by the deed from Fleming's trustees which we are now considering. This title is now vested in the defendant The Eastern Kentucky Railway Company, which is in possession of the most considerable portion of the land in controversy, and which, by reason of its title so derived from the deed now under consideration, is *estopped* to deny the execution of the deed from Charles Fleming to John and William Bryan, *the source of plaintiffs' title.*

In behalf of the plaintiffs in error, however, it is unreservedly conceded that this record is not in condition to give them, in its full force, the benefit of this proposition. We have too profound a respect for the character and dignity of this Court to make any suggestion, for any purpose not sanctioned by the most scrupulous regard for propriety; and it is solely because of the conviction, that the following explanation has a legitimate and necessary place in this brief, that it is made.

The attorney for the Eastern Kentucky Railway Company, in his opening to the jury, which, under the Kentucky practice, immediately followed that of the attorney for the plaintiffs, stated, in the strongest and plainest terms, that the Eastern Kentucky Railway Company claimed, and through conveyances from the heirs of James Howe was vested with, the title which McConnell had bought at sheriff's sale (*Pr. rec.*, *p.* 154). This rendered it necessary for the plaintiffs to show simply that the title so bought by McConnell was that conveyed

to John Bryan by the deed we are now considering, and having introduced the foregoing deeds, as sufficient to identify the title that McConnell had acquired and transmitted to Howe with the title conveyed by this deed, they relied, as they had a right to do, on this statement and admission of the defendant's attorney, and did not offer the remaining links in the paper title that brought it down to the Eastern Kentucky Railway Company. When the bill of exceptions was drafted by the attorney for plaintiffs, this solemn admission and statement on the part of the Eastern Kentucky Railway was, of course, embodied in it; but, on the settlement of the bill of exceptions, the learned Judge who had presided at the trial, by a misapprehension almost inconceivable, with all due respect be it spoken, ordered the statement and admission stricken out, because, in his opinion, admissions thus made by attorneys do not bind the parties.

> "The admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the cause."
>
> *Herman on Estoppel*, 353.

> "Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the Court's procedure equally as if established by the clearest proof."
>
> *Oscanyon* vs. *Arms Co.*, 103 *U. S.*, 261.

The ruling in the case cited is as to the effect *of an admission made in the opening statement of an attorney.*

But it is superfluous to cite authorities in support of a proposition so manifest on reason and principle. Unless the function of the attorney extends to the matter in question, his office is without dignity or practical usefulness, and the conduct of even the simplest cause becomes an undertaking of tremendous labor and difficulty.

It is not claimed that up to this point this explanation has answered any commendable purpose, unless it may be that of an apology, in behalf of the plaintiffs' attorney,

for the presence in this record of many matters the relevancy of which has, by the action in question, been hidden or obscured. But we think *that action, although not shown by the record*, does properly serve as a reason for saying to the Court that, no inference unfavorable to the ability of plaintiffs to make out their title should be drawn from the rejection of this deed as shown by this record, and that, even if under the showing made in the record, no error is apparent in the rejection of this deed, either as to this copy or the original deed as next below, the plaintiffs should be given the benefit of the usual practice in actions in ejectment. That is to say, the plaintiff in ejectment may, upon the rejection of any *one* of the *material links* in his title, rest his case without attempting to offer the remainder of his title, and take the judgment of the Court of review on the single question thus raised. The plaintiffs in the case at bar did not see proper to pursue this course, nor, on the contrary, did they attempt to put their entire title in evidence; but they did elect to offer every part of it against which any substantial objection could possibly be urged. If, therefore, the bill of exceptions thus presented discloses error in the rejection of *any one or more of the papers* offered by the plaintiffs (not of course of the mere collateral evidence offered *to the Court* in support of the evidence in chief, but of the papers constituting the title of plaintiffs and addressed to the jury) then, although the *error* in the rejection of others of such papers *may not appear*, the case should be reversed. And especially do the ends of justice demand that this course be followed, when the full correction of the error is made impossible, because of an imperfect record not presenting in the court of review the true basis of the action of the lower court; and when there is any credible suggestion that the facts which have been suppressed are of a character that would, if they were in the record, render the alleged error gross and manifest. Under the circumstances of the present case, the plaintiffs must be made the victims of error and

injustice, unless either the case is reversed on all points to which the assignment of errors is addressed, or the course above indicated is adopted. The plaintiffs should not further suffer, because the Court responsible for the error that appears, has improperly stricken from the record the facts by which still other errors would have been disclosed.

(*g.*) This deed is competent, under the attempt of the Eastern Kentucky Railway Company to sustain through Howe the plea of adverse possession, as set up in their answer.

"Possession is presumed to be in accordance with the legal title unless the contrary appears."

Winn vs. *Willett*, 5 *J. J. M.*, 523.

The extent and character of the possession is indicated by the instrument under which it is held."

Bennett vs. *Runyon*, 4 *Dana*, 422.

"It is a universal rule of law, as well as a principle of policy and justice, that the possession shall be held according to the title under which it was acquired."

Kirk vs. *Nichols*, 2 *J. J. M.*, 470.

"If the person to whom the deed was made hath been in possession of the lands contained in the deed, such possession shall be presumed to be under the deed, unless the contrary appear."

Gilbert Ev., *p.* 83.

It was competent, therefore, for the plaintiffs to trace Howe's title back through the deed of partition (*Pr. rec.*, *p.* 150), and to explain by this deed any possession he held within the patent boundary, and to show that as such possession was under this deed, it was therefore not of the land now claimed by the plaintiffs, but of a different portion of the original tract.

II.

THE NEXT ASSIGNMENT OF ERROR CONCERNS THE REJECTION OF THE ORIGINAL OF THE DEED, OF WHICH THE PAPER JUST CONSIDERED IS A COPY.

(*a.*) If a deed is so acknowledged and recorded that a certified copy thereof is admissible in evidence, the original of such a deed is thereby, and without further proof of execution, likewise rendered admissible.

Sharp vs. *Wickliffe*, 3 *Litt.*, 12.
Young vs. *Ringo*, 1 *Mon.*, 31.

If, therefore, the copy above offered was competent, the present paper, apart from the possible objection of redundancy, is also admissible.

(*b.*) But this paper was offered because it is competent as an *ancient deed*, and to cover the contingency that the copy might not be admissible as that of "a deed acknowledged and recorded according to law."

"An unrecorded deed admitted, or proved to be genuine, is good evidence of title, not only against the parties to it, but against all the world, except purchasers without notice and creditors."

Blight vs. *Atwell*, 7 *Mon.*, 267.
Fitzhugh vs. *Craghan*, 2 *Mon.*, 433.
McClain vs. *Gregg*, 2 *Mar.*, 457.
Bolling vs. *Ewing*, 9 *Dana*, 77.

"The omitting to record a deed within the time and manner prescribed by law does not reduce it to a mere equitable estate; it retains its legal quality, &c."

Taylor vs. *McDonald*, 2 *Bibb.*, 421.

It follows, that if this paper is admissible in evidence as an "ancient deed," it is as effectual a muniment of title, under the Kentucky decisions, as though acknowl-

edged and recorded in accordance with the strictest requirements of the law.

The Law of Ancient Documents.

The doctrine, as to the admissibility of ancient documents, has been stated, with substantial accord, by the writers of the principal treatises on evidence, now accepted as standard and authoritative.

(*a.*)—*The text-writers:*

Greenleaf on Evidence, § 144:

"An ancient deed, by which is meant one more than thirty years old, having nothing suspicious about it, is presumed to be genuine without express proof, the witnesses being presumed dead; and, if it is found in the proper custody, and is corroborated by evidence of ancient or modern corresponding enjoyment, *or by other equivalent or explanatory proof*, it is presumed that the deed constituted part of the actual transfer of the property therein mentioned, because this is the usual and ordinary course of such transactions among men."

Note 1 (*under above*).

"A graver question has been, whether the proof of possession is indispensable, or whether its absence may be supplied by other satisfactory corroborative evidence." (Citing Judge Kent, *in Jackson* vs. *Blanshaw*, 3 *Johns.*, 292 and other cases in support of the necessity of possession.) "But the weight of authority, at present, seems clearly the other way, and it is now agreed that where proof of possession cannot be had, the deed may be read if its genuineness is satisfactorily established by other circumstances."

Starkie on Evidence, *p.* 93:

"Hence, it seems that to support any presumption or inference from such an instrument, first, its antiquity is essential; secondly, that it should have been found in the place or repository in which a true or genuine deed or writing of that kind would have been deposited; thirdly, that it should be free from all suspicion which may rebut the

presumption raised in its favor; and, fourthly, in order to give it any weight it should be supported by proof of possession, or enjoyment, corresponding and consistent with it. Upon such a connection the force if not the admissibility of such evidence essentially depends."

Sharswood's note on the above, p. 95:

"* * * * In New York and some other of our sister States, and perhaps in England, it seems to be settled that a deed, appearing to be of the age of thirty years, may be given in evidence without proof of its execution, either by showing an accompanying possession, or, where there has been none such, rendering such account of it as will afford a reasonable presumption of its having been genuine. It has been said by a highly respectable authority, that almost any evidence intrinsically unobjectionable, and tending to raise a presumption of the fairness of the instrument, may be received, leaving its sufficiency to depend on the nature of each particular case. Though it must be confessed, that in Pennsylvania, the leaning of the determinations is in favor of the more rigid rule, which refuses to accept anything short of actual possession as corroborative of the supposed deed."

Starkie on Evidence, p. 524:

"It has already been observed that, in order to give authenticity to an ancient instrument, which does not admit of proof by the ordinary tests, it is essential to show that it has been brought from the natural and legitimate repository. * * * * Where an old deed is given in evidence, without proof of its execution, *some account ought to be given of the place where it has been kept*, OR evidence should be given so as to afford a presumption that the party has been in possession under the deed. But it is sufficient that a document be produced from a place where it was likely to be found, although it be not the most proper place of custody. As to such writings, some evidence should be given, to afford a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty."

Phillips on Evidence, p. 400:

"It is a rule that if an instrument is thirty years old it may be admitted in evidence without any proof of its execution; such an instrument is said to prove itself. * * * * The rule requires documents to

be produced from their proper place of custody, or, at least, from a place of deposit which, if not the one which would be strictly required by law, would be one where, in the ordinary course of things, the document, if genuine, might reasonably be expected to be found; and, in many instances, the circumstances of the instrument having been acted upon, and of the enjoyment of the property being consistent with and referable to it, or otherwise, afford a criterion of its genuineness."

Hill & Cowen, in their elaborate and much cited note 430, under the above say:

"Ancient documents are receivable as evidence of possession without strict proof of acts done under them, especially in cases where, from their great antiquity, it is not practicable to give such evidence, though it has been held that, even in such cases, their weight as evidence depends chiefly upon the account which is given of them, the custody from which they are produced, and *acts done*, or possession held, under them. The mere lapse of thirty years will not entitle a writing to be read as an ancient deed; it must appear to come from the custody of the party entitled to hold it, supposing it be genuine, and, either possession under it must be shown, *or some other corroborative evidence of its authenticity*, freeing it from all just grounds of suspicion.

* * * * * * * *

The above remarks with reference to the length of possession requied as indispensable, must be understood with the qualification that possession is the only circumstance relied on by way of showing the authenticity of the instrument. A full corresponding possession is not the only corroboration which will allow the instrument to be read, without proof of execution, though there are several *dicta* which look that way.

* * * * * * * *

Our author seems in the text to have laid down the rule in the true spirit of the English adjudications; and it obviously admits of this alternative, viz.: that if possession has not gone along with the deed, so as to furnish a presumption of its authenticity, from that source alone, *other circumstances may be resorted to.*

* * * * * * * *

Such unquestionably is the well settled rule in New York.

* * * * * * * *

Jackson ex dem. Lewis vs. *Larroway*, 3 *Johns. Cases*, 283, has never been overruled, but, on the contrary, has received the sanction of several subsequent adjudications. * * * * And it has been both recognized and acted on by the Supreme Court of the United States.

The cases are not clear, it would seem, whether the mere fact of the deed or instrument having existed thirty years, in the proper custody, is enough to allow it to be read: According to the English adjudications, this would furnish the requisite presumption of its authenticity."

And again, *Hill & Cowen's note*, 903; 1 *Phill. Ev.*, *p.* 1310:

"If possession has not gone along with the deed, so as to furnish a presumption of its authenticity from that source alone, *other circumstances may be resorted to.*"

The foregoing citations sufficiently show the doctrine maintained by the more eminent text writers and their annotators.

While Starkie, in the earlier passages, in apparent opposition to Greenleaf and Phillips, stoutly insists upon proof of possession or enjoyment as an indispensable condition to any weight being attached to ancient instruments, if not, indeed, as an absolute condition of their admission, yet, in the passage quoted from page 524 he states the proposition in the alternative.

"*Where an old deed is given in evidence, without proof of its execution, some account ought to be given of the place where it has been kept,* OR *evidence should be given so as to afford a presumption that the party has been in possession under the deed.*"

(*b.*)—*The Adjudications.*

An examination of the more important adjudications, will show an overwhelming weight of authority, in support of the proposition, in the form as last quoted from Starkie.

"It is only necessary to recur to the rule that a deed more than thirty years old, having nothing suspicious about it, is presumed to be genuine without express proof; the witnesses being presumed dead,

and when it is found in the proper custody, and is corroborated by enjoyment under it, *or by other equivalent explanatory proof*, it is allowed to prove itself, or rather its genuineness is presumed."

Carter vs. *Chaudron*, 21 *Ala.*, 91.

"A lease, more than thirty years old, may be read in evidence, without proof of its execution, although there may be no direct proof of possession accompanying it, if found among the title papers of the estate affected by it, and the facts and circumstances, in reference to the property specified in it, be such as to afford a reasonable presumption of its genuineness."

Hewlett vs. *Cook*, 7 *Wend.*, 371.

The Court further say :

"Ancient writings, which are proved to have been found among deeds of evidence of land may be given in evidence, although the execution cannot be proved"—"for finding them in such a place, is a presumption that they were honestly and fairly obtained, and preserved for use, and are free from suspicion of dishonesty."

"The general rule on this subject, I take to be, that a deed, appearing to be of the age of thirty years, may be given in evidence, without proof of its execution, if the possession be shown to have accompanied it, or, *where no possession has accompanied it, if such account be given of the deed, as may reasonably be expected, under all the circumstances of the case*, and will afford the presumption that it is genuine. The rule is founded, on the necessity of admitting other proof, as a substitute for the production of witnesses, who cannot be supposed any longer to exist. A correspondent possession is always high evidence in support of such a deed, *but where no such possession appears other circumstances are admitted to account for it, and raise a legal presumption in its favor.*"

Jackson vs. *Laroway*, 3 *Johns. Cas.*, 285.

The doctrine of the foregoing case is reaffirmed in :

Jackson vs. *Laguere*, 5 *Cowen*, 226.

Jackson vs. *Lamb*, 7 *Cowen*, 431.

"Where a deed is more than thirty years old, and attended with no suspicious circumstances, it requires no proof. This rule of law is so well established, that if the subscribing witnesses were known to be alive and within the jurisdiction of the Court, it would be unnecessary to call them."

Henthorn vs. *Doe*, 1 *Blackf.*, 163.

"A deed, appearing to be of the age of thirty years, may be given in evidence, without proof of execution, *or possession*, if such an account be given of it as may, under the circumstances, be reasonably expected, and will afford the presumption that it is genuine."

Enders vs. *Sternbergh*, 1 *Keyes* (*N. Y.*), 268.

The Court adds:

"If possession were absolutely indispensable, many a title would be destroyed, and *it was never the law*."

In Harlan vs. *Howard*, 79 *Ky.*, 373, the Kentucky Court of Appeals state the doctrine thus:

"We do not understand that the admissibility of such evidence depends upon testimony of accompanying possession of the lands embraced by the deed.

"*The genuineness of such instruments may be shown by other facts, as well as that of possession. And when proof of possession cannot be had, it is within the very essence of the rule to admit the instrument* where no evidence justifying suspicion of its genuineness is shown, and it is found in the custody of those legally entitled to it."

In Clark vs. *Courtney*, 5 *Pet.*, 344, it is said:

"The instrument purports to be an ancient one, but no evidence was offered, in this stage of the cause, to connect it with possession under it, so as to justify its admission as an ancient deed, *without further proof*."

This is a distinct recognition, that "*further proof*" might have been substituted for evidence of possession, and the instrument thereby rendered admissible.

In the case of *Winn* vs. *Patterson*, 9 *Pet.*, 674, the point was strongly urged by counsel, that possession, under an ancient deed, was an indispensable condition of admissibility. The paper against which the objection was urged, however, was determined by this Court to be admissible, in the entire absence of evidence of the character insisted upon.

The point was again directly involved in *Barr* vs. *Gratz*, 4 *Wheat.*, 220.

The Court say :

"Another error alleged, is the admission in evidence of the deed of John Craig to Michael Gratz, dated the 16th of July, 1784, without the regular proof of its execution by subscribing witnesses. But, as the deed was more than thirty years old, and was proved to have been in the possession of the lessors of the plaintiff, and actually asserted by them, as the ground of their title in the chancery suit, it was, in the language of the books, sufficiently '*accounted for*,' and on that ground, as well as because it was part of the evidence, in support of the decree, it was admissible, without regular proof of its execution."

It is obvious from the foregoing citations that the weight of authority is altogether with the proposition, that ancient deeds may be admissible in evidence, notwithstanding an entire absence of possession under them ; and it is still more manifest from the cases cited below, that no reputable showing whatever can, at this day, be made in support of the requirement of a "correspondent possession," as insisted upon in a few of the older cases ; that is to say, of a possession coinciding in extent with the boundaries named in the deed, and dating in point of time, from the execution of the deed.

"Now I apprehend, that it cannot be necessary, in order to entitle an instrument to be read as an ancient deed, to prove a corresponding possession of every portion of the premises which it purports to convey. A possession of part under the deed, affords evidence of its authenticity, of as high a character as though the possession extended to the whole."

Jackson vs, *Davis*, 5 *Cow.*, 128.

To the same effect—

Jackson vs. *Lamb*, 7 *Cow.*, 431.

In *Carhampton's lessee* vs. *Carhampton*, 1 *Irish*, *T. R.*, 567, the plaintiffs, in support of an ancient deed, proved possession, *for a portion of the time*, and also produced a clerk from the registry office, who proved that he found in the registry office the memorial of a deed agreeing in parties, witnesses, description, &c., &c., with the deed produced ; *held*, that the memorial might be read, and also the deed as

an ancient deed, leaving the question of authenticity to the jury.

The case of *Robinson* vs. *Craig*, 1 *Hill*, 389, is worth quoting at length.

"The cases in Johnson, however, are equally clear, that to entitle a deed of thirty years old to be admitted in evidence possession must have gone along with it for the whole time. *So in Jackson* v. *Blanshaw* (3 *Johns.*, 292), Judge Kent says that the antiquity of the deed is computed only from the time of possession taken under it. In *Middleton* v. *Moss* (2 *N. & M'C.*, 55), it was only said that some act of ownership is necessary. On the contrary, in the case of *Barr* v. *Gratz* (4 *Wheat.*, 221) it is said to be sufficient, if the deed be accounted for, as by showing that it has been in existence for the requisite length of time.

The English cases do not seem to be very explicit on the subject, nor entirely to agree. In some of them it seems to be thought sufficient if the deed be accounted for, by showing that it was found in some depository where it was natural to expect to find it, or produced by the person deriving a benefit under it. In others, possession according to the deed, or *acts done under it* are said to be requisite, without specifying anything very accurately with respect to the length or continuity of the possession. It appears to me that the circumstances mentioned *are required chiefly for the purpose of giving assurance that the deed has been in existence for the requisite length of time.* It is not to be supposed that a deed would be forged with a view to a fraud to be committed at the end of thirty years. I think a jury ought always to be satisfied, in some way, that it has been in existence for the length of time required. If no account at all is given of the deed, but it is merely offered in evidence on the trial, then proof of possession, according to it thirty years ago, continued to the present time, or with no inconsistent possession intervening, would naturally enough raise the presumption that the possession was held under the deed. Under such circumstances, I think, the proof of some act of possession ought to go so far back. But if the deed be shown to have been in existence thirty years, or for so great a length of time as to exempt it from the suspicion of having been contrived to answer the present purpose, or if there are other circumstances which exempt it from that suspicion, such as the place where it was found, with no inconsistent possession in the meantime, I should think that slight evi-

dence of possession, even of recent date, might be sufficient. Our practice of recording deeds will furnish some security on this subject. In the case before us I think it was stated in argument, though it does not appear from the record, that the deed in question was recorded soon after 1800. It does not appear that there has been any possession inconsistent with Mrs. Henshaw's title, previous to her taking possession. Under these circumstances, I concur with the Presiding Judge, that the evidence was sufficient to authorize the giving of the deed to the jury. No question was made in the argument on this part of the subject, but it seems to be necessarily involved in the case, and, as the case will come before a jury, I have thought it well to express these views respecting it."

O'NEAL, *J.*:

"I concur in this opinion generally, except in that part in which it is held that if no account is given of an ancient deed there must be some act of possession as far back as thirty years. In this respect I dissent, and hold that an ancient deed may be given in evidence by proving *any act* of possession under it."

The case of *Caruthers* vs. *Eldridge*, 12 *Grattan*, 673, is, however, easily the leading American case on this question. The opinion is eminently able and is a discriminating and elaborate review of the authorities.

The learned Judge delivering the opinion reviews the passages in Gilbert, Coke and Bacon that are usually supposed to sustain the necessity of a "correspondent possession," and it is clearly shown that, under a correct construction, these authors do not support the view of the necessity of such possession. The opinion in 2 *W. Black, R.*, 1228, is also shown not to be an authority in support of the doctrine in question.

Judge Kent's opinion in *Jackson* v. *Blanshaw*, 3 *Johns.*, 292, is reviewed and dissented from, with the remark that:

"The opinion of this learned Judge on any question of law is entitled to much respect; but it is to be observed that the decision in this case never had any force as authority, even in New York, inasmuch as it was made by only two Judges, a minority of the Court.

Van Ness, *J.*, concurred with Kent, *Ch. J.;* Spencer dissented, and Thompson and Yates did not hear the argument in the cause, and gave no opinion."

Doe vs. *Phelps*, 9 *Johns.*, 169, it is pointed out, was a case of fifty years' possession under a deed, and only affirms a well-settled doctrine.

The *opinion* in 6 *Binn.*, 439, is admitted to sustain the necessity of "correspondent possession," but the point was not really involved in the case, and the decision is that far *obiter dictum*.

Of *Carroll* vs. *Norwood*, 1 *Har. & J.*, 167, it is said that:

"It may fairly be considered as deciding that an ancient deed is not evidence, without proof of the execution, unless it is found that the possession has gone and been held according to the deed."

The two cases of *Deshazer* vs. *Maitland*, 12 *Leigh*, are held to have been decided under a misapprehension, and are overruled.

Still other American cases are fully considered:

"The doctrine of *Jackson* v. *Larroway*, is fully recognized by the Supreme Court of the United States, in the case of *Barr* v. *Gratz*, 4 *Wheat. R.*, 213; and by the Court of Appeals of South Carolina in the case of *Robinson* v. *Craig*, 1 *Hill*, 389. The subject is very fully examined by Greenleaf, in his Law of Evidence. In the 21st Section of the work, speaking of ancient deeds and wills, he says, "when these instruments are more than thirty years old, and are unblemished by any alteration, they are said to prove themselves; the bare production thereof is sufficient, the subscribing witnesses being presumed to be dead. This presumption, so far as this rule of evidence is concerned, is not affected by proof that the witnesses are living. But it must appear that the instrument comes from such custody as to afford a reasonable presumption in favor of its genuineness; and that it is otherwise free from just grounds of suspicion. Whether, *if the deed be a conveyance of real estate*, the party is bound to show some acts of possession under it, is a point not perfectly clear upon the authorities; but the weight of opinion seems in the negative."

* * * * * * * * *

"When the deed is of recent date, the party who offers it in evidence, is required to produce the witnesses to its execution, if any, or

proof of their handwriting, in case they are dead; and if there be no subscribing witnesses, he must prove the handwriting of the maker. But when the deed is of an ancient date, the production of such proof is no longer in the power, or is supposed to be no longer in the power, of the party. A resort to presumptive proof is then allowed. What is there in the nature of the enquiry which renders it proper to declare that a corresponding possession shall be the only sufficient evidence of the fact to be presumed, viz.: the genuineness of the deed? A presumption may be the result of a single circumstance or of many circumstances. Why say that, in the case of an ancient deed, there must be a departure from the general rule in respect to presumptions, and that its authenticity may be presumed from the single circumstance of possession, but may not be presumed from other circumstances, the existence of which is equally inconsistent with any other hypothesis than that of the genuineness of the instrument?"

"The direct evidence, the positive proofs, by which the execution of the deed is established, being no longer obtainable, and the rule which requires their production being dispensed with, it seems to me wholly at war with the spirit of the law, which, under such exigency, allows a resort to circumstantial or presumptive evidence, to hold that a corresponding possession shall be the only evidence from which the authenticity of the deed may be presumed. Such evidence does indeed, furnish a violent presumption, but, if in its absence, there are other evidences not intrinsically objectionable, equally capable of producing the same degree of belief, I cannot see the good to be attained, or the evil avoided, by rejecting them."

Some doubtful cases examined.

Several New York cases that, on a casual reading, might seem to be in conflict with *Jackson* vs. *Larroway*, *Hewlett* vs. *Cook*, &c., &c., may be briefly examined.

In *Staring* vs. *Brown*, 6 *Barb.*, 109, the Court rejected a will, offered as an ancient document, *because*, it was actually proved in the case that one of the subscribing witnesses was still living, and within the jurisdiction of the Court. The Court based the ruling upon the proposition, that it was the duty of the party to produce the *best* evidence, to wit, the subscribing witness. This is in conflict with the rule laid down by Greenleaf, as quoted in 12 Gratt., *supra*, but does not

affect the question in the case at bar. It simply amounts to this—that the *presumption*, which might otherwise have obtained, was neutralized by evidence actually introduced, and, though this evidence was, in the first instance, superfluous, and perhaps even, from the strictest point of view, incompetent, the Court held the party to the consequences disclosed by it. As to the matter of possession involved in the case there is no real conflict between this case and the earlier New York cases we have cited. In this case the defendant, who relied upon the will, was admitted to be in actual possession of the property, and the inquiry was allowed and made, as to whether that possession was connected with the will, or any claim under it, and it was found in the negative. Such possession was virtually in conflict with the tardy attempt to take advantage of the provisions of the will, and the parties could not very consistently claim that an instrument was entitled to much weight, which, although in existence for more than thirty years, and affecting property of which they were in the actual occupancy, they had themselves, in effect, construed as conferring no right. The admissibility of ancient documents rests solely on the doctrine of presumptions, and the most effective manner of discrediting and rebutting them, is by showing a possession incompatible with the right they purport to convey. If the party offering such a document has himself thus discredited it, he cannot complain of its rejection.

In *Ridgeley* vs. *Johnson*, 11 *Barb.*, 527, the instrument in question was one that was inoperative in its own terms to convey title, and there were no less than eight valid objections to its admissibility. There was no attempt to establish the authenticity of the paper by showing such a possession, as alone would have been sufficient, or by "*accounting for it*" otherwise, or showing that it had ever been "*acted on*" in any manner whatever. And again, in this case, evidence was introduced showing that the subscribing witness was alive and within the State. The Court very properly, in view of all these circumstances, *held*,

"The mere existence of a deed for more than thirty years, without any proof of accompanying possession, is not enough in any case to authorize it to be read in evidence, as an ancient deed, without proof of its execution."

"In this case, as I understand the facts, it is not pretended that there has been such possession as would furnish a presumption of the authenticity of the instrument *from that source alone*, even if it were an instrument which, if proven, would sustain a chain of title. It was necessary, before it could be read in evidence, that some proof of its execution should be adduced. It was proved that the subscribing witness to the agreement was alive and still residing in this State. No reason was given why he was not produced. I think the omission was a fatal negligence on the part of the plaintiff."

The last of the New York cases to be noticed is *Wilson* vs. *Betts*, 4 *Denio*, 208. In the course of an elaborate opinion, it is said:

"Proof that a deed is more than thirty years old, or that it has existed for any length of time, however great, *without other circumstances*, is no evidence of its authenticity."

And where a deed was shown to have been in existence more than sixty years, and to have been in the custody in which it would be expected to be, if genuine, but no possession had been taken, or *other act done under it, and the lands had been held adversely, held*, that its authenticity as an ancient deed was not established.

"The antiquity of a deed, where nothing has been done under it, is a circumstance tending to discredit it rather than to authenticate."

"To authorize the reading of a conveyance not proved, as an ancient deed, it must be shown that possession has been taken, *or some other unequivocal act done* under it, or that its validity has been admitted by parties having an adverse interest."

The deed in question was in a badly mutilated condition, and it belonged to a class of deeds for military bounty lands, which were so notoriously fraudulent as to have been the subject of legislation. A second deed by the same grantor for the same land, dated shortly after the date of the deed offered,

was produced and proved. This second deed had been duly acknowledged and recorded.

The Court explicitly states, that while possession is highly satisfactory evidence, it is not indispensable, and that the authencity of the deed might have been avouched by other circumstances, and concludes by saying that, notwithstanding the grave doubts cast upon the deed by the facts mentioned, it might properly have been submitted to the jury whether, upon all the evidence, they could find in favor of the deed.

"Where possession has accompanied the deed, or *other unequivocal acts have been done under it*, the longer it has existed the greater the presumption that it is genuine."

The lands conveyed by this deed were at the date of the deed wild and uncultivated, and under none of the authorities is possession required in the case of such lands.

At the date of this deed, to wit, December 31, 1796, and for years thereafter, the large body of forty thousand acres of land which it conveys must have been a wilderness. Sufficient appears in the record, when taken in connection with the facts of which the Court must take judicial notice, to establish this fact.

Our present contention is with furnace and mining companies, which proves the lands to be mineral, and not agricultural in their character.

"The possession of wild and uncultivated lands follows the title and actual possession of such lands has, under the rule of American decisions, been dispensed with in many cases where, by the English rule, possession of enclosed and cultivated lands was required."

Bradstreet vs. *Clarke*, 12 *Wend.*, 680.

Sharwood's note to Starkie, p. 95, as heretofore quoted, states the rule in Pennsylvania:

"But were the issue litigated involves the title of wild and uncultivated lands, which have never been the subject of actual *pedis possessio*, the question assumes a very different aspect even in Pennsylvania. (*Williams* vs. *Hillegus*, 5 *Barr*, 494.)"

The same doctrine has had the direct recognition of this Court in many cases.

In *Green* vs. *Liter*, 8 *Cranch*, 229, it is said:

"A conveyance of wild and vacant lands gives a constructive seizin thereof, in deed, to the grantee and attaches to him all the legal remedies incident to the estate.

"At the time of the passing of the Act of 1779, Kentucky was a wilderness. It was the haunt of savages and beasts of prey. Actual entry or possession was impracticable; and, if practicable, it could answer no beneficial purpose. It could create no notoriety; it could be evidence to no vicinage of a change of the property. An entry therefore would have been a vain and useless and perilous act, and the law does not oblige to vain and impossible things."

In the seventeen years from 1779 to 1796, great changes had undoubtedly taken place in the condition of Kentucky, as described in the opinion just quoted, but it is confidently submitted that those changes were not sufficient, to render possession of the vast body of land conveyed by this deed an indispensable requirement in establishing the authenticity of the deed. So far as that requirement may exist, it could only arise as of a date, when the state of things pictured in this opinion had passed away, and then the requirement would be conformable to such possession as was appropriate to lands of that character, extent, situation, &c.

Although, according to the overwhelming weight of authority, evidence of possession under the deed is not necessary to authentication, the plaintiffs do show such possession.

At page 170 of the printed record, it appears that:

"*The plaintiffs in further support of the competency of said original deed,*" (meaning the deed now under consideration) "*introduced evidence showing possession by said James Howe of portions of said* 18,000 *acres of land patented to Charles Fleming, and also evidence showing sales of portions thereof by said James Howe, in addition to those shown by the deeds above mentioned; and also evidence showing settlements of divers persons on said land, by and under said James Howe.*"

"The deeds above mentioned" are the deeds recited at (*f*) *supra* of this brief, and through the sheriff's deed, the deed of partition, &c., derive the title of Howe directly from the deed now in question. Possession under this deed is therefore clearly made out.

But this deed was so "acted on," and so fully "accounted for," that its authentication, apart from any evidence of possession, is sufficient and complete.

1. It was "*acted on*" in the partition made by the Commissioners, and title was conveyed to Hughes on the basis of its validity. (*Pr. rec., pp.* 150,152.)
2. It was "*acted on*" in the sale by the Sheriff and his deed to McConnell. (*Pr. rec., pp.* 154.)
3. It is the basis of the entire chain of conveyances recited at (*f*) *supra* of this brief.
4. It was "*acted on*" in, and is the basis of, the suit of *Hughes* vs. *Shores*, in the Greenup Circuit Court, the record of which is part of the printed record in this case.
5. It was "*acted on*" in the deed by which John Bryan conveyed to Samuel Sackett the title which this deed had vested in Bryan. (*Pr. rec., p.* 178.)
6. It was recorded in 1816 in the Clerk's office of the Kentucky Court of Appeals, as appears by the certified copy at page 58 of the printed record.

In the case of *Barr* vs. *Gratz*, 4 *Wheat.*, 220, this Court considered that as the deed there in question had been "asserted by the plaintiffs as the ground of their title in a suit in chancery," and proper custody was shown, it was sufficiently "accounted for," and, it being thirty years old, on those facts alone admitted it in evidence. The authenticity of the deed now under discussion is established by evidence of a far more conculsive character, than that adjudged sufficient in *Barr* vs. *Gratz*, for this deed was, as we have just stated, the basis

of the proceedings in partition; it was asserted in the case of *Hughes* vs. *Shores* "as the ground of the title" of the complainant (*Pr. rec., p.* 90); the Sheriff sold under execution the title it conveys, and executed his deed accordingly, and we show some ten or twelve subsequent conveyances predicated thereon, and, as it was admitted to record in the Clerk's office of the Court of Appeals, in 1816, there is to be especially included among these assurances,

The presumption from the deed's having been recorded.

The fact that a deed has been admitted to record, although neither the acknowledgment, nor the time or place of recording, was in accordance with the technical requirements of the law, is dwelt upon in many cases as a circumstance of almost controlling import.

It is said by Hill & Cowen in Note 430, before cited, that "almost any evidence intrinsically unobjectionable, and tending to raise a presumption of the genuineness of the instrument, is admissible" in support of a paper offered as an ancient deed.

"Proof of such circumstances as could not well have happened, without the existence of the deed, affords a presumption that the deed is fair."

Thompson vs. *Bullock*, 1 *Bays' Rep.*, 364.

That a deed has been admitted to record, although irregularly, is most certainly "a circumstance that could not well have happened without the existence of the deed, and affords" (the strongest) "presumption that it is fair."

Such a deed was considered by the Kentucky Court of Appeals in *Cook* vs. *Totten*, 6 *Dana*, 110, and it is said:

"And though, as has been settled by this Court, after the time has expired, for taking the acknowledgment or proof, the clerk was not authorized to take it, or admit the deed to record, and, if taken and admitted to record, the clerk's certificate is not evidence of the due execution of the deed, yet, when we take into consideration its age and *the endorsement by the clerk, an accredited officer of the common-*

wealth, combined with the fact, that the deed had been spread on the records as a document of title, and had so remained, without question or impeachment, for about thirty years, together with the proof tending," &c.

Dickerson v. *Talbot*, 14 *B. M.*, 434, *discusses the point more fully:*

"The deed from Fowler to Banks had been acknowledged before the Clerk of the Lexington District Court, on the 21st of December, 1802, and recorded in his office. It had also been recorded in the office of the General Court, in October, 1813, on the certificate of acknowledgment, made by the Clerk of the Lexington District Court. On the 2d of March, 1814, the same deed was acknowledged by the grantor, before the Clerk of the Fayette County Court, who certified the acknowledgment thereof to the Clerk of the Boone County Court, and this certificate was recorded in the Clerk's office of the General Court, but the deed itself was not recorded in the Clerk's office of any court upon the last-named certificate.

The Clerk of a District Court was only authorized to take the acknowledgment of deeds for the conveyance of land lying within the district (1 Vol. M. and B. St. Law, 436). As this land was not within the Lexington District, the Clerk of that Court had no authority to take the acknowledgment of the deed, or to record it in his office, and as the time for recording the deed had expired in 1814, the Clerk of the Fayette County Court had no power at that time to take and certify an acknowledgment of its execution. (*Moore* v. *Farrow*, 3 *Mar.*, 43). So that this deed was not legally recorded either in the office of the Lexington District Court, or in the Clerk's office of the General Court, and could not have been recorded under the certificate of acknowledgment made by the Clerk of the Fayette County Court in 1814.

A deed from Fowler to Banks, executed in 1813, for one thousand acres of adjacent land, which called for a corner of the land previously conveyed to said Banks, and thus recognized the execution of the prior deed, was also read in evidence. It was also proved by a witness that he had examined the records of the Fayette County Court, contained in the deed book of the District Court, and the records of the General Court, and found in each, a deed from Fowler to Banks, on record, corresponding with the copies from the clerks of said Courts, produced upon the trial.

The plaintiffs relied upon the existence of these records, as an additional circumstance to establish the fact that Fowler had executed to Banks a deed for the land in contest, and the question to be considered is, whether it was right to allow the plaintiffs to prove their existence, and rely upon them for this purpose? We are of the opinion that it was, under the peculiar circumstances of this case.

When we take into consideration the age of the records, *which had been made by accredited officers of the commonwealth*, together with the other proof, tending to show the execution of the deed, and the possession of the land under it, and the fact that the original deed had been lost, we are not able to perceive any valid reason why the existence of such records, if not competent evidence either of the due execution of the deed, or of its contents, should not be admissible as testimony, conducing, when combined with the other circumstances, to prove that the deed relied upon from Fowler to Banks, had been executed by the former.

The other testimony authorized the introduction of the copy of the deed before the jury, as evidence of the contents of the original, so that the permission to prove that a record of this copy existed in the office of the Lexington District Court, and in the office of the General Court, for many years, did not enable the plaintiffs to read to the jury a written document which would have been otherwise excluded."

In *Taylor* vs. *Cox*, 2 *B. M.*, 434, the *clerk's fee bill*, for recording a deed and power of attorney, was held admissible in support of the papers as ancient deeds, though the power of attorney was not recorded in time, nor otherwise sufficiently proved.

In *Morgan* vs. *Marshall*, 7 *J. J. M.*, 317, a sworn copy, made by a deputy clerk, of a deed that had not been fully proved within the period required by law, and had not been recorded, was permitted to be read to the jury.

In 2 *Har. & J.*, 104, *Dorsey* vs. *Gassoway*, an examined copy was admitted of a lost deed, which covered property in respect to which it was not recordable, and the Court say they considered such copy the next best evidence to the deed itself.

In *Beall* vs. *Dearing*, 7 *Ala.*, 124, a certified copy of a reg-

istered deed which the law did not require to be recorded, was held to be sufficient evidence that such a deed once existed at least to permit the party to go before the jury.

In *Garwood* vs. *Dennis*, 4 *Bin.*, 314, the Supreme Court of Pennsylvania admitted in evidence, the copy of a deed alleged to have been lost, taken from the records of Newcastle County, Delaware, although the deed had not been so executed as to entitle it to have been recorded in the State of Delaware, and, of course, could not be considered as a record giving publicity and affecting purchasers; but from the improbability that the recorder would have placed it upon record, without having seen and carefully compared it with the original, from which a fair presumption might arise that such original did once exist.

In *Booge* vs. *Parsons*, 2 *Vt.*, 459, it is said:

"It is to be noticed, then, that the act of the town clerk, which is claimed to be a record of the deed in question, is of considerable antiquity, having taken place nearly forty years ago; that this copy deed, thus enrolled upon the public records, could have been placed there for no other purpose than that of recording the original, consistently with the duty of the recording officer; that through a long course of time and a succession of recording officers, this writing has never been expunged from the records, nor in any way discredited; and that it appears to be a perfect record, saving only the want of a certificate or attestation."

In *Allen* vs. *Parish*, 3 *Ohio*, 112:

"The copy of the deed on the notarial book of Shannon would not be legal evidence by itself. The notary had no authority to record the deed, neither could a copy from his book, nor the book itself, be received in evidence of its existence, or its contents unaccompanied with other proof; but after a sufficient foundation had been laid from which to infer its existence, the copy on the notarial book, accompanied by such facts as were proved in connection with it, might be admitted as auxiliary evidence."

"The acknowledgment of the deed was necessary to its completion. It was proper to acknowledge it before Shannon as a Justice of the

Peace, and he being a notary at the time, it was natural, though not necessary, to record it among his notarial proceedings."

Skipwith vs. *Shirley*, 11 *Ves., Jr.*, 64.

A copy that appeared not to have been executed by any of the parties admitted. The charges in the books of a deceased solicitor, for attending the execution of a deed, competent evidence of the fact of execution.

Ward vs. *Gornons*, 17 *Ves. Jr.*, 185.

Existence and execution of a deed presumed chiefly from the existence of the drafts prepared by the solicitor. The competency of an attested copy of such a paper again declared.

Ben vs. *Peete*, 2 *Rand.*, 539, is an able and excellent opinion.

Welsh vs. *Barrett*, 15 *Mass.*, 383.
Nichols vs. *Webb.*, 8 *Wheat.*, 326.

The case of *Wilson* vs. *Betts*, 4 *Denio*, 208, appears to be in conflict with some of the foregoing cases, but it does not conflict with those cases which hold that a record made *in the discharge of an official duty*, although technically invalid, is nevertheless evidence of a high grade, as to all that such a record naturally and reasonably would imply, if technically perfect and regular. Such, for instance, is the recording by a clerk of deeds for lands within his county or district, although such deeds may be technically defective as to acknowledgment, or not recorded within the time fixed by statute. The two certificates in *Wilson* vs. *Betts*, which the Court declared to possess but the slightest significance, were pronounced to be wholly "*unauthorized and unofficial*"—that is to say, the officers making the certificates could under no circumstances have *officially* performed such an act in respect to the lands in question. It remains, however, that the conclusions of the Court are broader than are consistent with the rulings of the other cases we have cited.

In the case of *Winn* vs. *Patterson*, 9 Pet., 672, it is said the power of attorney in question "was not recorded in the County of Franklin where the lands lie, but in the County of Richmond, and therefore a copy from the record is not strictly admissible in evidence, as it would have been if powers of attorney were by law required to be recorded in the counties where the lands lie, and the present power had been so duly recorded."

The argument was that a copy made from such a record, that is, a record that was without legal sanction, was to be regarded as a mere copy of a copy, but the Court held that it was to be regarded as strictly a copy of the original, as though the record had been made in pursuance of statutory authority. The Court say:

"We are to consider that the original instrument (supposing it to be genuine) is of an ancient date, having been executed in the year 1793, and recorded in the public records as a genuine instrument in 1795, so that at the time of the trial it was forty years of age."

The offer of the deed from the Sheriff to McConnell in support of this deed, was in proper form.

This deed was offered without the judgment and other proceedings in the case (*Pr. rec.*, *p.* 154) because it was not introduced for the purpose of showing a valid transfer of title, but only for the collateral purpose of showing that the deed from Fleming's trustees to Bryan had been recognized and "acted on," and that the claim and possession of Howe were under that deed.

8 *Watts & Serg.*, 387.
3 *Green.*, 373.

So also, for a like purpose, the report of the Commissioners and the deed in partition (*Pr. rec.*, 150), *were competent.*

"The objection to the record of partition between the heirs or devisees of Nicholas Lang, because it was *res inter alios acta*, ought not to have been made. The authenticity of the record was not disputed, and, if it had any legal bearing whatever on the title of the

plaintiff, the defendant *who had as yet shown no title*, cannot object to the muniments of the plaintiffs' title, whether they be deeds, wills or partitions, because they are *res inter alios acta*."

Webb vs. *Den.*, 17 *How*, 576.

The parol evidence offered by the plaintiffs in support of this deed was competent.

"The plaintiffs, in further support of said original deed, offered to prove by parol testimony that there was recorded in the deed book of the Kentucky Court of Appeals Clerk's office, containing deeds recorded in 1816, a copy of a deed identical in terms with the said paper purporting to be the original of said deed," and the Court below rejected this testimony. (*Pr. rec., p.* 150.)

In *Dickerson* vs. *Talbot*, 14 B. M., 60, such testimony was admitted, and on elaborate consideration of the question the Court of Appeals pronounced it competent.

This Court will inspect the original deed.

Under section 4 of rule 8, of the rules of this Court, this paper, offered as an original, and also the two other papers of the same character, have been sent up as part of this record, and as they are open to the inspection of the Court, comment upon their condition and appearance is unnecessary.

We think, in view of the foregoing considerations, that if it be now shown that this deed was produced from a place of "proper custody," its authentication is complete, and we therefore proceed to the enquiry as to,

The law of the proper custody of ancient documents.

The following are cited as among the most authoritative adjudications on this subject:

"In order to render a written document admissible, it is not necessary to show that it has come from the most proper place of custody; it is sufficient if it comes from a place where it might reasonably be expected to be found."

Crampton vs. *Blake*, 12 *M.* & *W.*, 209.

In *Wildgoose* vs. *Pearce*, 2 *Moody & Robinson*, 240, the Court say:

"It is not necessary that the custody from which an ancient document comes should be strictly according to the legal right; it is enough if it be brought from a place of deposit where, in the ordinary course of things, such a document might, if genuine, be reasonably expected to be found."

It is said in 8 *Ad. & E.*, 151, *Neale* vs. *Sampler*:

"I never understood that the custody, to be shown for the purpose of making a document evidence, without proof of execution, was necessarily that of a person strictly entitled to the possession; it is enough if the person be so connected with the deed that he may reasonably be supposed to be in possession of it without fraud, no such fraud being proved."

It was objected in this case that a mortgage was not admissible because found among the papers of one against whom its provisions were to operate, and the Court conceded that such custody was not strictly regular.

A leading English case is that of *Bishop of Meath* vs. *Marquess of Winchester*, 3 *Bing, N. C.*, 200. The Court say:

"The result of the evidence upon the bill of exceptions we think is this: that these documents were found in a place in which, and under the care of persons with whom, the papers of Bishop Dopping might naturally and reasonably be expected to be found, and that is precisely the custody which gives authenticity to the documents found within it, for it is not necessary that they should be found in the best and most proper place of custody. If documents continued in such custody there can never be any question as to their authenticity; it is when documents are found in other than the proper place of deposit that the investigation commences, whether it is reasonable and natural, under the circumstances of that particular case, to expect that they should have been in the place where they are actually found, for it is obvious that while there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable, though differing in degree, some being more so, some less, and in these cases the proposition to be determined is whether the actual custody is so reasonably and probably to be accounted for

as to impress the mind with the conviction that the instrument found in such custody must be genuine."

In 11 *Q. B.*, 887, *Shrewsbury* vs. *Keeling*, Lord Denman, *C. J.*:

"Most of the reported cases are decisions in favor of receiving documents, on the ground that they have come from proper custody, and the Courts, I think, ought to be liberal in this respect."

Wightman, *J.*:

"I am entirely of the same opinion. Documents are admissible which are found in a place in which, or in the hands of a person with whom, they might be expected to be found. It is not necessary that it should be the most proper custody, for then no question would arise; *the cases discussed have been those in which the custody has been other than that which was strictly the most proper.*"

An interesting case is that of *Slater* vs. *Hodgson*, 9 *Q. B.*, 725.

On the trial of an issue, a bond, to indemnify parish officers against the charge of a bastard, was offered in evidence. It was dated in 1716, and was brought from a chest kept in the workhouse of a Union comprehending the parish, and in which chest were kept muniments belonging to the Union. There was no direct evidence how it was placed in the chest; but it was proved that in 1842 (case was decided in 1846), several documents were brought to the work-house by a pauper, and placed in the chest, but it was not known whether the bond was among these documents brought by the pauper or not.

Held, that "enough appeared to satisfy the rule in regard to proving deeds to be brought from a proper depository, and that the evidence was admissible."

We have been forced to this exclusive citation of English authorities on the doctrine of "proper custody," because, for obvious reasons, such as the comparative newness of the country, and the effect of, and reliance upon, the registration laws, by which certified copies are made competent, American authority on the subject is almost wholly lacking.

The facts in connection with the production of this deed, and its place of custody.

This deed was produced by a deputy clerk of the Greenup Circuit Court, under a *subpœna duces tecum*. It had been found by one of the attorneys of the plaintiffs among the papers in the case of Hughes *vs.* Shores, and was produced by the deputy clerk with the other papers of that case and as part thereof (*Pr. rec., p.* 63). The entire record in the case of *Hughes* vs. *Shores* is copied into this record, and embraces from page 63 to page 150 of the printed record—the bill being on page 90. This suit did not concern the identical land involved in the case at bar, but was for the purpose of quieting the title of Hughes to the 16,000 acre tract which the deed conveys, and the deed was a proper, nay, an indispensable, exhibit in behalf of Hughes. The bill was filed on the 15th of July, 1815, and the lands were in Greenup County, and the suit was properly brought and regularly prosecuted in the Greenup Circuit Court.

The deed was produced, therefore, from the archives of the highest Court of the County in which the lands are situated, where it was under the care of an officer especially charged with the custody and safe keeping of such records, and where it had been placed for a perfectly proper and necessary use and purpose, such as was compatible only with its absolute authenticity and genuineness. All this sixty-five years before the time at which it was produced on the trial below, and within less than twenty years from the date of its execution. It is not difficult to maintain that this was "*proper custody*," nor even under all the circumstances, that it was in strictness the "*most proper custody*."

After the deed had been recorded in the Clerk's office of the Court of Appeals in 1816, the parties, claiming under it, undoubtedly supposed that it was so recorded, that certified copies would be admissible in evidence, and so supposing, felt that there was necessity for a less vigilant preservation of the original, than if they had been dependent upon it alone to establish title. In *Dickerson* vs. *Talbot*, 14 *B. M.*, 60, the

Court of Appeals of Kentucky comments upon the fact that the effect of the registration law, and the reliance upon certified copies, had been such that it was no longer customary for the grantor to pass to his grantee, on a conveyance of land, such muniments of title as he might possess. The lands conveyed by this deed would soon become subdivided into many parcels, and, if access to the original deed were necessary, it could be far more readily obtained, when it was lodged in the Clerk's office of the Greenup Circuit Court, than if it were in the private custody of any one of the numerous persons, the right of custody in each of whom was equally strong.

It may be, however, that we shall have to again combat here, the reason for the rejection of the deed assigned by the learned Justice *in eyre*, who tried the case below, namely, that the plaintiffs offered no evidence as to *how long the deed had been among the papers in Hughes* vs. *Shores*. We do show, however, that that suit was filed in 1815; it does appear from Hughes' bill that he set up this deed as the source of his title, and on page 149 of printed record is found a "list of the papers filed by James Hughes" in the suit. Of course, this "list" in the printed record, is simply a copy from the original found in the case, and among the "papers" so enumerated is this "original deed." It would seem, therefore, rather more reasonable to presume that, the deed once being there, it had remained, than to presume that, although once there and now found there, it had in the interval been removed and then returned, and thereby to impose on the plaintiffs the burden of proving "how long" since such return was made.

Wherefore, having shown that this deed was produced from strictly proper custody, and having sufficiently established its authenticity otherwise, in accordance with the requirements of the best authorities, we submit that its admissibility is fully demonstrated, and that because of the error in its rejection, the judgment of the lower Court should be reversed.

III.

As to the two papers next offered by the plaintiffs, to wit, the copy and the original of the deed from John Bryan to Samuel Sacket (*Pr. rec., pp.* 174, 177), substantially the same considerations apply, as are applicable to the copy and the original of the deed just discussed, except that it is not here insisted that the *copy* of the deed now in question was admissible.

IV.

The original deed from Charles Fleming to John and William Bryan (*Pr. rec., pp.* 180, 181).

Here, again, for the most part, substantially the same facts and principles apply as in the case of the originals of the two deeds already considered.

The account given in the Bill of Exceptions of the offer of this deed is as follows:

"*And thereupon the plaintiffs offered in support of the competency of said deed the same proof as was offered in support of the two last above-mentioned deeds; and further that it was found at the same time and place and produced from the same custody as were the said two last above-mentioned deeds, and in addition thereto, and in further support thereof, the plaintiffs produced the Clerk of the Mason County Court, having with him deed-book B, containing deeds recorded in the said Clerk's office of the Mason County Court, beginning February* 22, 1794, *and the two or three years next ensuing, and offered to show that there was recorded in said deed-book, a deed identical in terms with the aforesaid original deed, and the Court refused to hear said deed, as recorded, in said deed-book read, or to admit the same in evidence.* To which ruling, &c."

In order to the fair consideration of the ruling of the lower Court in excluding this deed, the concession should first be made by the plaintiffs in error that the recital in the Bill of Exceptions that "*the same proof was offered in support of the*

competency of this deed as was offered in support of the other two original deeds," is inaccurate. In point of fact, there was *no evidence of possession* under this deed, such as was introduced in the case of the other deeds. The question as to this deed, therefore, is simply whether it has been sufficiently "accounted for" and shown to have been "acted on," to render it admissible in the entire absence of possession under it. We maintain that, notwithstanding such absence of possession,

(*a.*)—*This deed is sufficiently authenticated by the facts peculiar to itself, and is further strongly confirmed by most of the evidence offered in support of the other two original deeds.*

1. A certified copy of the deed from the Mason County Clerk's office was produced in support of it and was admitted. (*Pr. rec., p.* 181.)

   It was recorded in the Mason County Clerk's Office in December, 1796.

2. It was directly "acted on", in the deed from Fleming's trustees to John Bryan as above, and by necessary implication, was "acted on" in the whole chain of conveyances, under the deed last mentioned. It was directly "acted on" in the deed from Sackett to Conkling, and in the mortgage from Conkling to Sackett, and it was explicitly "acted on" in the report and deed of partition by the Commissioners. And finally, it was "the ground of the title" involved in the suit which Clark, as assignee of the mortgage to Sackett, brought against Conkling for the foreclosure of that mortgage; for the property involved in the foreclosure suit was that conveyed by this deed and none other.

   The case is thus plainly within the rule of *Barr* vs. *Gratz*, 4 *Wheat.*, 220. In the language of *Wilson* vs. *Betts*, 4 *Denio*, this deed was certainly "*put in use.*"

(b.)—*The Court erred in refusing to let the deed, as recorded in deed book of the Mason County Court, be read.*

In *Winn* vs. *Patterson*, already twice cited, this Court say :

> "It is certainly a common practice to produce, in custody of the clerk, under a subpœna *duces tecum* the original record of deeds *duly* recorded."

It was not for a moment doubted, in the case just cited, that the original record produced by the clerk was competent, but the entire question was as to whether such record was not *the only competent evidence*, and the doubt raised and the objection insisted upon, were as to the admissibility of a *certified copy*. If the deed book is regarded as being the form of evidence freer from doubt than the certified copy in the case of "deeds duly recorded," the argument in its favor would seem to be doubly strong in a case, such as the present, where the *deed has not been "duly recorded,"* and where the certified copy, as evidence in chief, is conceded to be inadmissible. Nor can it be correctly contended that, by reason of the subsequent admission of the certified copy this error in the rejection of the deed book, did not operate to the material prejudice of plaintiffs; for the ancient deed book, with the deed recorded in its proper place among deeds of its own date, afforded evidence in favor of the authenticity of the deed of a materially stronger character, than was possible to furnish by a certified copy, inasmuch as the age of the book, the place of the deed in the book, and other important facts, could not be made to appear by means of the certified copy, and the plaintiffs were entitled to the benefit of this evidence in the strongest and most convincing competent form in which they were able to produce it.

A certified copy of this deed not admissible.

This deed was before the Kentucky Court of Appeals in the case of *Womack* vs. *Hughes*, *Litt. Sel. Cas.*, 292,

decided in 1821, and it was held that the absence of the word "subscribed," from the certificate of the Woodford Justices of the Peace, and the fact that it had not been recorded within eight months, rendered a certified copy inadmissible. The latter of these objections has been removed by the Act of 1816, but the first remains, and has made necessary the introduction of the original instrument, in lieu of a certified copy.

V.

The final offer of evidence, in behalf of the plaintiffs, was of the transcript of the record in the case of Clark vs. *Conkling.* (*Pr. rec.*, 185.)

(*a.*)—*The history of the case.*

This was a suit brought by Clark, as the assignee of the mortgage from Conkling to Sackett, for the foreclosure thereof.

Clark began his suit in the Washington District Court, on the 13th day of June, 1798.

The Sheriff returned the subpœna in Chancery, "No inhabitant of this Commonwealth," and on the 20th day of June, 1798, this order was made in the case:

> "It appearing to the satisfaction of the Court, that the defendants are not inhabitants of this Commonwealth, on motion of the plaintiff, by his attorney, it is ordered that the said defendants appear here on the third day of the next term, and answer the complainant's bill, and that a copy of this order be inserted in the Kentucky *Gazette*, or Kentucky *Herald*, for two months successively; another posted at the door of the Court House of Mason County; and that this order be published some Sunday, immediately after divine service, at the door of the Baptist Meeting-House in Washington."

(*Pr. rec.*, *pp.* 185, 186.)

The defendants did not appear in the case, the bill was taken *pro confesso*, decrees *nisi* and final were entered; the sale of the land was ordered; Commissioners appointed for that purpose did, in fact, make such a sale; Clark, the complainant and the assignee of the mortgage, became the purchaser; and the sale was reported to the Court and confirmed. (*Pr. rec., pp.* 188, 191.)

The principle in accordance with which judgments, decrees, &c., are admissible in actions of ejectment is thus stated in *Barr* vs. *Gratz*, 4 *Wheat.*, 220, *supra:*

> "It is true that in general, judgments and decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case like the present, where the decree is not offered as *per se* binding upon any right of the other party, but as an introductory fact to a link in the chain of plaintiff's title, and constituting a part of the muniments of his estate.
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> * * * * * * * * *
>
> "It might with as much propriety be argued, that the plaintiff was not at liberty to prove any other title deeds in this suit, because they were *res inter alios acta.*"

(*b.*)—*The grounds of objection to this transcript, as insisted upon below, were two-fold.*

1. That it contained no evidence of the execution of the order warning the defendants to appear, and, therefore, the record did not show that the Court acquired jurisdiction.

2. That no deed to Clark from the Commissioners, by whom the land was sold, was tendered in evidence, (in fact it was conceded that no such deed existed), and, therefore, no title was vested in Clark by the sale and proceedings in the case, on which ejectment could be maintained.

(c.)—*The Act of* 1796.

This suit was prosecuted under the provisions of the Act of 1796, in force from January 1, 1797, which will be found at the close of this brief.

The second section of this Act applies to cases, in which the debts or effects of an absent debtor, are attached or enjoined in the hands of a resident party. It relates purely to actions for debt. Under this section it is required that the order shall be published for two months in the newspaper, that it shall be published "in some meeting-house," and that it shall be *posted* at the Court-House door. Section four relates to "all cases whatever where a suit is or shall be depending in any Court of Chancery, concerning any matter or thing whatever, against any absent defendants," and requires the Court to make an order "*similar* to that which is directed to be made against *absent debtors*, adapting the same to the nature of the case, a copy of which shall be *published* in like manner as is directed in the case of *absent debtors*."

The first and second sections of the Act of 1796, are taken from § 36 and § 37 of the Virginia Act of October, 1777.

Henning's Stat. at Large, Vol. 9, p. 896.

The fourth section was unknown in the Virginia practice until the Act of January, 1788.

Henning's Stat. at Large, Vol. 12, p. 466.

The Kentucky Act copies these sections *verbatim*.

The Court of Appeals in *Watts* vs. *Griffin*, *Litt. Sel. Cas.*, 246, held the application of the sections to be respectively to the two classes of cases as above stated.

In *Hollingsworth* vs. *Barbour*, 4 *Pet.*, 472, Justice Baldwin says:

"The first act of Assembly is the act of the 19th of December, 1796, copied from the pre-existing laws of Virginia. That act provides for the case where a suit in Chancery is commenced against any defendant or defendants who are out of this Commonwealth, and others within the same, having in their

hands effects of, or otherwise indebted to, the absent defendant, &c. ; and the second section authorizes the Court to have publication made two months successively in an authorized newspaper, and, if the absentee still fails to appear, to proceed to decree, &c. This act manifestly applies only to cases of debts or duties personal, for the satisfaction of which the debts or effects of the absent debtor are attached or enjoined in the hands of the resident party."

The suit was under section four of the act, and only publication in the newspaper was required.

Clark's suit against Conkling, therefore, not being for the purpose of "attaching or enjoining the debts or effects of an absent debtor in the hands of a resident party," but for the purpose of foreclosing a mortgage, is a case under section four. Section two provides for warning to the absent defendant in three different forms, two of which, namely, insertion in the newspaper, and proclamation *in* the church, it denominates "publishing," and the third of which, that to be given at the Court-House doors, it calls "posting." The fourth section simply provides that the order shall be "*published* in like manner as is directed in the case of absent debtors, &c." The second section itself discriminates between "publishing" and "posting," and it is therefore submitted that by no reasonable construction of section four can the word "published," as there employed, be held to include the "posting" of section two. When the two words are considered necessary in the section to which section four refers, how can the one word "published" in section four be held to mean the same thing as is meant by the two words "publish" and "post" in the previous section. And if the word "published" in section four does not include the "posting" of section two, it becomes obvious that the word is used in section four in its usual signification of insertion in a newspaper, the signification it bears when first used in section two, and

that therefore the proclamation in the church is no more required under section four than is the "posting" at the Court-House door. And if, as it is proper should be done, this being a question of the *construction* of a statute, we apply the rule, in trying to arrive at its meaning, that "where the reason ceases the law itself ceases," the correctness of the construction insisted upon becomes manifest. The proclamation in church, and the posting at the Court-House door, might very well serve the purpose of giving notice in the case, where the debts and effects of the absent debtor were to be attached in the hands of a resident party, but such steps could certainly answer no practical end whatever in cases under section four, such as the foreclosure of mortgages, &c., where all parties to the suit are non-residents.

The fact of publication in the newspaper was proved by evidence aliunde, and such evidence was competent.

If, then, it be the true meaning of section four that publication of the order in the newspaper is all that is required, the objection as to jurisdiction in Clark *vs.* Conkling is fully met. For although the record in that case is silent on the point, yet we show by evidence *aliunde* the record, that the order was *in fact* published in the Kentucky *Gazette*, in exact compliance with its own terms and the requirements of the laws.

> "And thereupon the plaintiffs produced the assistant-librarian of the public library at Lexington, having with him printed newspapers which appeared to be of great age, and which purported to be the original files of the newspaper called the *Kentucky Gazette*, published weekly, and plaintiffs showed, in nine successive issues of said newspaper, weekly publications, beginning with December 12, 1798, and ending with February 7, 1799, of an advertisement in words and figures as follows, to wit:"

(Then follows the order of November 24, 1798, as shown at page 188 of printed record.) (*Pr. rec., p.* 199.)

It has been settled by the repeated rulings of this Court:

"That the jurisdiction of any court, exercising authority over a subject may be enquired into, in every other court, when the proceedings of the former are relied upon and brought before the latter, by a party claiming the benefit of such proceedings."

Thompson vs. *Whitman*, 18 *Wal.*, 457.
Elliot vs. *Piersol*, 1 *Pet.*, 328.
Wilcox vs. *Jackson*, 13 *Pet.*, 511.
See also *Ferguson* vs. *Crawford*, 70 *N. Y.*, 253.

In the case of *Thompson* vs. *Whitman*, the ruling is that the *recitals* of the record may be contradicted as to the facts necessary to confer jurisdiction. The question being thus always an open one, of course evidence, in support of the jurisdiction, is equally admissible with evidence in opposition to it.

"Presumptions are indulged only to supply the absence of evidence or averments, respecting the facts presumed."

Galpin vs. *Page*, 18 *Wal.*, 350.

The plaintiffs might have relied upon presumptions in support of the jurisdiction.

The introduction of evidence in behalf of the plaintiffs to prove the fact of the execution of the order, was under the well settled rules of law, redundant. The plaintiffs need only have invoked the presumptions that universally obtain in regard to judgments of this character.

The District Courts of Kentucky were Superior Courts of general jurisdiction.

An Act to establish District Courts in this Commonwealth. Approved Dec. 19, 1795.

§ 8. "The jurisdiction of the said District Courts, respectively shall be, of all persons and things, at Common Law or in Chancery, arising within their districts, whether brought before them by original process, *certiorari*, or mandamus, or by any other legal ways or means whatsoever, except of actions of assault and battery, or suits of slander, which shall be cog-

nizable in the Courts of quarter-sessions only ; *provided always*, that no person shall sue out original process for the trial of any matter or thing of less than fifty pounds, unless it be against the Justices of an inferior court, on pain of being non-suited."

1 *Litt. Laws*, 302.

An Act to reduce into one the several acts establishing District Courts in this Commonwealth. Approved Feb. 12, 1798.

§ 11. "The District Courts, respectively, shall have jurisdiction over all persons and in all causes, matters or things, at Common Law or in Chancery, arising in their districts, except in cases of assault and battery, trespass and actions of slander, or where the debt or demand shall be under fifty pounds current money, in which cases they shall have no jurisdiction whatsoever except where the same shall be brought before them by either party by *certiorari*."

2 *Litt. Laws*, 127.

The adjudications of this Court, directly in point on this question, as to the character of these courts, are:

Kempe vs. *Kennedy*, 5 *Cranch*, 173.
Harvey vs. *Tyler*, 2 *Wal.*, 328.

In reference to Superior Courts of general jurisdiction the familiar rule is, that, whenever their judgments are introduced collaterally, every presumption, *not inconsistent with the record*, is to be indulged in favor of their jurisdiction.

Voorhees vs. *Bank*, 10 *Pet.*, 444.
Harvey vs. *Tyler*, *supra.*
Galpin vs. *Page*, 18 *Wal.*, 350.
Newcomb vs. *Newcomb*, 13 *Bush*, 565.

The record, even as against persons without the territorial jurisdiction of the Court, need only show such jurisdictional facts, as would properly and regularly, under the requirements of the law and the practice of the time, become a part of the record.

It is true that in *Galpin* vs. *Page*, it is most rightfully declared that:

> "The presumptions are limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also to proceedings which are in accordance with the course of the common law."

The question in *Galpin* vs. *Page*, however, was as to whether the presumption could be invoked to supply a fact not disclosed by the record, but *which by the regular practice of the Court in which, and the requirements of the Act under which, the proceedings were conducted must, if it had existed, have been evidenced in a manner that would have made it, in the first instance, a part of the record.* That is to say, the defect in the record consisted in the absence of an *affidavit* and *order* of the Court, matters necessarily in written form, and which would regularly be shown in the record of any case, of which they had ever been a part. This Court, therefore, ruled, in effect, that in a proceeding in derogation of the common law, and against a person beyond the territorial jurisdiction of the Court, it would not presume the existence of a fact the evidence of which ought properly to have been in the record. A double and mediate presumption would indeed be necessary in such a case—first, the presumption that the fact once existed, that the conditions had been performed which, under the requirements of the law and in accordance with the practice of the Court, caused the jurisdiction to attach—and secondly, the presumption that some accident or inadvertence had interposed, which kept or removed from the record, the evidence in that behalf. This Court has seen proper to declare that in a case so important for the security of private rights, the immediate and single presumption, that the fact never existed is the one that shall obtain.

It is confidently submitted, however, that this rule, whether purely arbitrary, and adopted without regard to the probabilities of fact that may lie beyond the record, or based wholly on such probabilities, can have no application to any matter, the evidence of which, *offered under the regular and ordinary practice of the Court, would not become a part of the record, and the evidence of which the provisions of the Act regulating the proceedings, neither require to appear of record, nor prescribe such a form for, as would make it essentially a part of the record.*

The Act of 1796 is wholly silent, as to the form of the evidence of the execution of the order, which shall be accepted by the Court, and contains no requirement that such evidence shall appear of record.

It would have been strictly in accordance with the old practice in Chancery, for the Court to have received, on such a point, *viva voce* evidence of which there would be no memorial.

1 *Barb. Chy. Prac.*, 368.
Consequa vs. *Fanning*, 2 *Johns. Chy.*, 482.
Barnes vs. *Lee*, 1 *Bibb.*, 528.
Crist vs. *Brashears*, 3 *Mar.*, 171.

Even after the adoption of the Act of 1803 by which it was prescribed that "the certificate of the printer, in whose paper the said order shall have been published," should be the evidence of the fact of publication, the Kentucky Court of Appeals, in *Jeffrey* vs. *Collis*, 4 *Dana*, 466, used the following language:

"Had the statute prescribed the certificate as the only legal evidence of publication, and had a file of the *Paris Citizen* been exhibited, instead of the certificate, although this Court might reverse the decree, because the Circuit Judge had erred in admitting any other evidence than that prescribed by the statute, surely, as we think, we could not pronounce such a decree void.

Nor, for a like reason, could a decree be deemed void

in judgment of law merely because the Court may have permitted *oral* testimony, upon oath or otherwise, by the editor, printer, or any other credible person, as proof of publication. And if the error of admitting an affidavit in Court, or the testimony of a stranger, or of the editor, under the sanction of an oath, would not have rendered the decree void, it seems to us clear that the error, of admitting as proof the certificate or mere statement of the editor, could not render it void."

To the same effect, *Hardin* vs. *Strader*, 1 *B. M.*, 286.

It is to be noted, however, that the Act of 1803, does not "prescribe the certificate of the printer as the *only evidence*," and it may very well be contended that, even after the adoption of that act, *viva voce* evidence, such as *would not appear in the record*, would have been competent, in accordance with the practice in Chancery.

In each of the cases that have come before this Court, involving the question of presumptions in support of jurisdiction, great weight has been attached to the consideration we are now examining.

In *Voorhees* vs. *Bank*, 10 *Pet.*, 449, it is said: "The *provisions of the law do not prescribe what shall be deemed evidence that such acts have been done, nor direct that their performance shall appear in the record.*"

And because there was no such requirement in the law, the Court supplies, by presumption, the facts on account of the absence of which the jurisdiction of the Court was impugned.

The Ohio act involved in *Voorhees* vs. *Bank* was in *pari materia* with the Kentucky Act of 1796. The nature and scope of the two acts are identical, and the judgment, the jurisdiction in respect to which was called in question in *Voorhees* vs. *Bank*, had been rendered in a proceeding to attach the effects of a non-resident debtor. The analogy between the case at bar

and *Voorhees* vs. *Bank* is far more complete, than was the analogy between that case and *Harvey* vs. *Tyler*, which this Court so strongly emphasized in their opinion in the last-named case.

And again, in this case of *Harvey* vs. *Tyler* the Court indicate the controlling significance of the consideration above stated as follows :

> " Care is taken that the Commonwealth shall be represented by capable counsel, and *the only fact required by the acts to appear on the record* is the presence of such counsel. That the appearance of this fact on the record, is made the only one essential to the validity of the judgment, is strong evidence, that the other facts on which the judgment of the Court may depend need not so appear."

In *Thompson* vs. *Tolmie*, 2 *Pet.*, 165, the point was again before the Court, in an aspect that went to the jurisdiction of the Court by which the judgment under consideration had been rendered, and it is said :

> " The age of the heirs was at all events a matter of fact, upon which the Court was to judge, *and the law nowhere requires the Court to enter on record the evidence upon which they decided that fact.* And how can we say but that the Court had satisfactory evidence before it that one of the heirs was of age ?"

In each of these cases the Court treats the absence of evidence as to the jurisdictional facts as entirely immaterial, because there was no requirement in the practice of the Court, or in the provisions of the laws in question, that such evidence should appear. In Galpin *vs.* Page, as before said, the proposition is just the converse of this, because there the evidence was essentially of a character that the record should have shown. It would seem, that nothing could be more irrational, in examining a record eighty years old, than to insist that it should contain that which, under the practice of the day, and the requirements of the law, would have been abnormal and wholly alien. It is, therefore, respect-

fully suggested, that the proposition in Galpin *vs.* Page should be so extended, as to take on the qualification just indicated, namely, that even as against persons not within the territorial jurisdiction of the Court, the accepted presumptions are to be indulged, in support of judgments the records of which contain all such evidence touching jurisdictional facts as, in accordance with the practice of the day and the requirements of the law, ought properly and naturally to have been made part of the record, and that the absence of evidence, not thus required to appear, shall not be ground for impugning the jurisdiction.

If this proposition, as formulated, is sound, these considerations are conclusive in favor of the record of Clark *vs.* Conkling.

It is, by the way, somewhat curious to notice in connection with this subject, though not now of practical import, that the proclamation in the church, which the Act of 1796 provided for, was a mode of warning, or service, substantially "according to the course of the common law."

"The writ of proclamation," and "attachment with proclamation" were the essence of outlawry at common law; and this proclamatian in the church was a modified process of outlawry.

Freeman on Judgments, § 127, 3 *Black. Com.*, pp. 283, 444.

Directions as to the execution of order are not properly part of the order, and do not affect its validity.

It may be maintained, however, that as the order of November 24, 1795, was the one, the publication of which in the Kentucky *Gazette* has been proved, it will be presumed that it was also the one that was otherwise executed, and that as it does not contain the words, "immediately after divine service," as provided in the act, the omission is a material, or indeed fatal one, as

showing on the face of the record a lack of jurisdiction.

The case of *Blight* vs. *Banks*, 6 *Mon.*, 200, is authority in point in this behalf.

An order of publication, directing the advertisement eight weeks instead of two months, but in fact published for two months, was held sufficient.

> "It has been frequently held by this Court that proof of insertion for eight weeks only is insufficient. But the proof is clear that the order was in fact inserted two months in succession, and it has never been held that if the order said eight weeks it vitiated the publication made the proper length of time. The note of the time of the insertion of the order is intended for a direction to the printer, and is not essential to the validity of the order."

If the note of the time of publication is a mere direction to the printer, and not essential to the validity of the order, by parity of reasoning, the same rule must be applied to the direction to publish the order "immediately after divine service," and the omission of those words from the order of November 24, 1798, is immaterial. The order of the 20th of June, it will observed, contains those words.

The direction in the order, however, is that it be published "*at the door* of the Baptist meeting-house," while the act requires that it shall be published "*in* the meeting-house." Is there a necessary conflict between the direction of the order, and the requirements of the law; or may the order be executed in accordance with the direction, and yet meet the requirements of the act? It is submitted that while in its most usual sense "at the door" implies before entrance, it does not always, or necessarily, have that significance. Webster says, "at the house" may mean either "*in* or *near* the house." There is a place "*in*," or within the house, which equally, with the correlative place on the out side, is "at the door," and the direction in this order will be understood as applying to the place "near" the door and "*in* the meeting-house."

The opinion in Green vs. *Breckinridge.*

The Kentucky Reports contain but one case, in which these provisions of the Act of 1796, have come under consideration. The explanation of this fact is found in the early repeal of these provisions by the Act of 1803. The case in question is *Green* vs. *Breckinridge*, 4 *Mon.*, 521. That case was on a bill of revivor, against the heirs-at-law of the former defendant, and it appeared, that when the interlocutory decree was entered it had been discovered that while the order against the absent defendants had been published in the newspaper, it had not been *published* in the meeting-house, or posted at the Court-House door. And thereupon the *interlocutory decree* directed that "this order," that is the original order, be "*posted*" at the meeting-house door. The Court of Appeals, in reviewing this case, point out that there was no authority for directing the order to be "posted" at the door of the meeting-house; that the magistrate before whom affidavit was made that the order had been "*posted* at the meeting-house door," had no authority to administer such an oath, and "that the order posted, had expired by its own terms long before it was posted," and "warned the defendants to appear at a day that had elapsed not less than two years before it was posted." The Court also held, "that only the reading or proclaiming the order in the assembled church would do," but they did not rule, and it is submitted, that in a case which showed that the order had been "posted" at the door, they could not properly adjudicate upon the question, as to the validity of an order, where the direction is that it be "*published at the door.*" Indeed, the whole opinion in *Green* vs. *Breckinridge* proceeds upon a wrong basis. It treats the question as one of presumption, whereas, it is in fact the case of a record which affirmatively discloses a lack of jurisdiction. It is within this language of *Galpin* vs. *Page*: "But presumptions only arise with respect to jurisdictional facts, concerning which

the record is silent. They have no place for consideration when the evidence is disclosed, or the averment is made. When, therefore, the record states the evidence with reference to a jurisdictional fact, it will be understood to speak the truth on that point; and it will not be presumed there was other or different evidence respecting the fact." The original decree in *Green* vs. *Breckinridge*, was for the conveyance of a tract of land which the plaintiff claimed under an alleged prior entry.

The Act of 1803 *was passed before final decree.*

It should not be overlooked that the final decree in Clark vs. Conkling, was not entered until August 22, 1810. On the date mentioned, the case being now in the Circuit Court (the successor in the judicature of Kentucky of the District Court), it is recited:

> "And it appearing to the Court that no final decree was entered in the said District Court, or has been since entered in this Court, it is now decreed and ordered," &c., &c.
>
> (*Pr. rec.*, 190.)

On December 22, 1803, an act was approved by which the requirement, as to the publication of the order in the church, and the posting at the Court-House door was repealed. (See Act at close of brief.) The defendants therefore had the only notice that was required by law from and after December 22, 1803, and any new order in that behalf after the date named, could only require to be again done, what had been already once done in strict compliance with the law as amended.

Clark vs. *Conkling was an action in rem, and the decree as to status of res is final.*

There remain certain considerations of a somewhat broader scope than those we have been discussing that remove the validity of the decree in Clark vs. Conkling beyond all possibility of doubt.

The suit for the foreclosure of the mortgage was a proceeding *in rem*.

"Hence, we conclude that proceedings to foreclose a mortgage are *only* proceedings *in rem*, to reach the pledge, and when that is accomplished, equity has nothing further to do in the matter."

Downing vs. *Palmateer*, 1 *Mon.*, 67.

And it is further said, by the Court to be bad practice to give a decree over for any deficiency, unless in cases where the aid of a court of equity was necessary to proceed at all in the matter.

In *Martin* vs. *Wade*, 5 Mon., 78, it is said:

"The general rule as stated by this Court, in *Downing* vs. *Palmateer*, is well settled that the business of the chancellor in foreclosing a mortgage is simply to enforce the lien *in rem*, and not to decree the demand *in personam*, and whenever the estate is subjected to the demand, the power of the chancellor over the subject ceases, so that all decrees for the amount before the sale, or for balances after the sale, are generally improper."

To the same effect, *Dunkley* vs. *Van Buren*, 3 *Johns. Chy.*, 330.

"A suit for the foreclosure of a mortgage is a proceeding *in rem*, and *per se* attaches a lien to the thing proceeded against."

Thomas vs. *Southard*, 2 *Dana*, 480.

As marking the progress toward the modern doctrine, by which the mortgage has become a mere security, an incident of the debt, we note the later case of *Breckinridge* vs. *Ormsby*, 2 *J. J. M.*, 256, in which it is *held*:

"A bill to foreclose a mortgage is *in rem* and *in personam*, and either the thing, or the person of the defendant gives jurisdiction."

This Court has ruled in *Pennoyer* vs. *Neff*, 5 *Otto*, 734:

"It is true that, in a strict sense, a proceeding *in rem* is

one taken directly against the property, without reference to the title of individual claimants, but, in a larger and more general sense, the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are the cases commenced by attachment against the property of debtors, or instituted to partition real estate, *foreclose a mortgage*, or enforce a lien. So far as they affect a property in the State, they are substantially proceedings *in rem*, in the broader sense we have mentioned."

In *Rose* vs. *Himley*, 4 *Cranch*, 270, it is said:

"In proceedings *in rem*, the jurisdiction depends upon the constitution of the Court and the state of the thing, that is, as to it being within or without the jurisdiction territorially."

In *Ferril* vs. *Combs*, 2 *J. J. M.*, 246, it is held:

"As to so much of the decree as applied to the equitable lien, the Chancellor had jurisdiction *in rem, independently of statutory authority.*"

That is to say, independently of the statutes requiring notice to non-resident defendants by publication.

In the aspect that Clark *vs.* Conkling was a proceeding *in rem*, it is horizontal with the cases of *Voorhees* vs. *Bank*, 10 *Pet.*, 449; *Harrey* vs. *Tyler*, 2 *Wal.*, 332; *Cooper* vs. *Reynolds*, 10 *Wal.*, 308. The Court had jurisdiction of the *res*, the land, and as to that the decree is final and conclusive, without present regard or inquiry as to how far the requirements of the act, in respect to publication, etc., may have been complied with.

In *Harvey* vs. *Tyler*, it is said:

"In the case of *Voorhees* vs. *Bank*, 10 *Pet.*, 449, the validity of certain proceedings in attachment were called in question, on the ground that the record of the Court of Common Pleas, in Ohio, in which the proceedings were had, did not show certain steps which the law required. The defendant in the

attachment proceedings was a non-resident, yet his land had been levied on, condemned and sold, without an affidavit, without notice by publication; without calling him three times, at three different terms of the Court, and without waiting twelve months from the return of the writ before the sale; all of which are specially required in the Act regulating the proceedings. Here was a case of special and stringent proceedings *in rem*, in the absence of jurisdiction over the person, where material provisions of the law for the protection of the defendant's rights, were omitted, so far as the record showed. 'It is contended,' said this Court, 'by the counsel of the plaintiffs in error, that all the requisitions of the law are conditions precedent, which must not only be performed before the power of the Court to order a sale, or of the auditors to execute it, can arise but such performance *must appear in the record*.' This is precisely what is contended for in the case now before us, and the circumstances of this case and of that are remarkably similar, in their relation to the principles which we are now discussing. The Court said in reply to this:

'The provisions of the law do not prescribe what shall be deemed evidence that such acts have been done, or direct that their performance *shall appear in the record*.'

'We do not think it necessary to examine the record in the attachment suit, for evidence that the acts alleged to have been omitted appear therein to have been done. Assuming the contrary to be the case, the merits of the present controversy are narrowed to the single question, whether this omission invalidates the sale. The several Courts of Common Pleas of Ohio, at the time of these proceedings, were courts of general jurisdiction, to which were added, by the Act of 1805, the power to issue writs of attachment, and order of sale of property attached on certain conditions; no objection therefore can be made to their jurisdiction over the case, the cause of action or the property attached.'

'There is no principle of law better settled, than that every act of a Court of competent jurisdiction shall be presumed to have been rightly done, until the contrary appears. If the defendants' objection can be sustained, it will be on the ground that this judgment is false, and that the record of sale

was not executed according to law, because evidence of its execution is not in the record. The same reason would apply equally to the non-residence of the defendant within the State, the existence of the debt due the plaintiff, or any other creditor, which is the basis of the whole proceeding.' "

No deed is necessary, where the mortgagee, or the assignee of a mortgage, purchases mortgaged property at judicial sale.

The record in Clark *vs.* Conkling was admissible, although unaccompanied by a deed from Commissioners under the foreclosure sale, and although it was conceded that such deed would not be offered and had never existed.

The mortgage vested the legal title in Sackett. After the maturity of the debt Sackett could, as the law then stood, have maintained his action in ejectment against the mortgagor.

Jones on Mort., § 719.
Carroll vs. *Ballance*, 23 *Ills.*, 9.
Redmon vs. *Sanders*, 2 *Dana*, 68.
Dougherty vs. *Kercheval*, 1 *Mar.*, 53.
Stewart vs. *Barrow*, 7 *Bush*, 371.
Brookover vs. *Hurst*, 1 *Met.*, 665.

This Court say, in *Probst* vs. *Brock*, 10 *Wal.*, 519:

"It is true that a mortgage is in substance but a security for a debt, or an obligation to which it is collateral. As between the mortgagor and all others than the mortgagee it is a lien—a security—and not an estate. But, as between the parties to the instrument, or their privies, it is a grant which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only a right to redeem. Formerly, if the condition was not strictly performed, the estate of the mortgagee, at first conditional, became absolute, and the mortgagor's right to redeem was lost."

The common law doctrine as to the rights and remedies of mortgagees, and the nature of the estate conveyed

by mortgage, remained in force in Kentucky until the adoption of the Civil Code of Practice in 1852.

New. & Cin. Bridge Co. vs. *Douglass*, 12 *Bush*, 704.
Douglass vs. *Cline*, 12 *Bush*, 620.
Caufman vs. *Sayre*, 2 *B. M.*, 207.

The assignment of the mortgage to Clark put him, in all particulars, in the place of Sackett.

"The assignment by deed puts the assignee in the place of the mortgagee. It is *ipso facto* a transfer of the premises covered by the mortgage. It passes the legal title, &c."

Jones on Mort., § 757.
4 *Cruise Dig.*, 88.
Adams vs. *Cottrell*, 2 *Biss.*, 351.
Warden vs. *Adams*, 15 *Mass.*, 237.
Probst vs. *Brock*, 10 *Wall.*, 519.

The assignment from Sackett to Clark contains the words, "grant, bargain, sell, alien, remise, release and assign, all the right, title and interest of the said Samuel Sackett of, in and to the annexed indenture of mortgage, and the lands therein mentioned," and was in apt terms to pass the entire estate to Clark. (*Pr. rec.* 197.)

Adams vs. *Cottrell*, *supra.*

Clark, the assignee of the mortgage, became the purchaser at the commissioners' sale in foreclosure.

"Where the mortgagee becomes the purchaser no deed is required."

Jones on Mort., § 1660.
Lannoy vs. *Wilson*, 30 *Md.*, 550.
Jackson vs. *Colden*, 4 *Wend.*, 276.

"A decretal order of foreclosure passes no new title to the mortgagee; it is only a bar to the pre-existing equity of redemption, and makes irredeemable the title which before was redeemable. A purchaser under a decree of foreclosure acquires

no new right of the mortgagee; he only acquires the right of the mortgagee made absolute by the decree of foreclosure."

Fenwick vs. *Macey*, 2 *B. M.*, 487.

In *Voorhees* vs. *Bank*, 10 *Pet.*, *supra*, it is said:

"As to whom the deed is made on a judicial sale, is a matter entirely between the bidder and such person. It is immaterial to the *defendant, because his right is extinguished by the sale and confirmation.*"

If the "sale and confirmation" extinguish the right of the defendant mortgagor, and the mortgagee, as such, or his assignee, already holds the legal title, the proposition, that no deed is necessary where the mortgagee, or the assignee of the estate with which the mortgagee has been vested, becomes the purchaser at the judicial sale, is certainly an entirely logical one.

But the case of *Bedford* vs. *Duly*, 1 *J. J. Mar.*, 222, leaves no room for argument, so far as the question is concerned.

"But it is again objected that the decree of sale is erroneous in appointing a commissioner to convey the land sold to the purchaser, without a day having been first given for the absent defendant to make the conveyance; but if the commissioner was properly directed to convey, it is, moreover, objected that the conveyance was improperly made to Benjamin instead of the purchaser, Archibald Bedford.

"Where the *legal title* resides in an absent defendant, it is certainly proper that a day should be given him to convey, before commissioners are appointed to do so, but in the present case, *as the legal title was transferred to Bedford by the deed of mortgage*, no conveyance from Duly was necessary to pass the title to the purchaser, and, consequently, it cannot have been error not to give him a day to do that, which was totally unnecessary for him to do, and which, if done, could produce no effect whatever."

Clark vs. *Conkling a formal proceeding.*

It is to be further remarked that the proceeding for the forclosure of this mortgage was one purely of form, and

involved no substantial right of the defendants whatever. The mortgage was executed for the purchase money due under Sackett's conveyance to Conkling and Loyd.

(*Pr. rec.*, 187.)

"Where the mortgage is for purchase money, and the mortgagor does not appear in the case, *strict foreclosure* is a proper remedy."

Jones on Mort., § 1540.
Carroll vs. *Ballance*, 23 *Ills.*, 9.

The proceeding being, therefore, a formal one, and not involving any substantial right, the language of the Court in *McGennis* vs. *Allison*, 10 *Serg. & R.*, 198, is strikingly applicable.

"This case is attended with every circumstance which should operate on the mind of a Judge not to require the very strictest possible inquiry, but to be satisfied with a reasonable inquiry, * * * for the conveyance itself is but a *formal* instrument, and not a real sale."

The case of *Sinclair* vs. *Jackson*, 8 *Cow.*, 577, cited *post*, is especially to be noted for its clear statement of this proposition.

Objections not from any one whose rights were affected.

And this Court in *Harvey* vs. *Tyler*, *supra*, attach evident weight to another consideration that characterizes the case at bar.

"It is to be remarked of all these objections to the judgments of exoneration, that the parties who made them show no patent or other title from the State of Virginia, and are setting up defects in those judgments of which neither the State of Virginia, which was a party, nor the trustees of the Literary Fund, who were entitled, if they were invalid, have ever complained."

The defendants at no point in this case assert any claim or title, derived from a common source with that of the plaintiffs, which is in conflict with the validity of the deeds, decree, &c., offered by the plaintiffs. As

against defendants in this position, we are by no means subjected to the strictest requirements as regards the form and technical sufficiency of our evidence.

Sufficient proof of assignment of mortgage to Clark.

It was not necessary to offer independent proof of the execution of the assignment from Sackett to Clark, *before offering the assignment as a part of the record of Clark* vs. *Conkling.*

On this proposition, we cite:

Sinclair vs. *Jackson*, 8 *Cow.*, 577.

"It was contended on the part of the defendant, that the plaintiff below was bound to produce the original mortgage to Mapes and Oakley, upon the authority of the rule that prevails in the case of a sheriff's deed, under an execution upon a judgment at law, which was supposed to be an analogous case. I do not see the analogy. The sheriff's deed derives its force from the judgment; for the office of the execution is to enforce the judgment to which it refers, and from which it derives all its virtue, and, hence, the necessity of producing the judgment which is the source of title. But the decree was itself of equal force with a judgment, and the deed executed by the master is declared by statute to be as valid, as if the same had been executed by the mortgagor and mortgagee, and to be an entire bar against them, and each of them, and their heirs. The decree then was sufficient, for it was the adjudication of a court of competent jurisdiction upon the subject matter, and it could not have been necessary to produce the mortgage, and besides, *the defendant, who was a stranger to the proceedings, had no right to object to the non-production of the mortgage, for he was not a party to the forclosure, and the sale could not divest him of any right he had to the premises.*"

Sinclair *vs.* Jackson was an action in ejectment.

Grebbin vs. *Davis*, 2 *A. K. Mar.* 17, is another case in the same line.

"For the purpose of proving title to the land, Davis did, it is true, introduce a decree, and a conveyance made in conformity

thereto, pronounced against the heirs of Cowar, deceased, but that decree, although the previous proceedings were not introduced, we apprehend, when taken in connection with the other evidence in the cause, sufficiently demonstrated Davis' right to the land. From the decree itself, the heirs of Cowar, in whom the title seems then to have been, appear to be parties, and although before enrollment, the bill and answers might be required, before the decree would be regularly used in evidence, yet after an enrollment, and, as in this case, *after a sale and confirmation thereof by the Court pronouncing the decree*, there is no necessity for introducing the proceedings previous to the decree. Nor can the circumstance of the heirs being infants alter the case, for as the Court pronouncing the decree, possessed the power of directing the sale of the lands, after a decree and sale, the proceedings must, *prima facie*, at least, be presumed to have correctly obtained."

So in the case at bar, the Washington District Court having rendered a decree in favor of Clark, *as assignee of the mortgage*, it must be presumed, at least, against those who were not parties to the proceeding, and whose rights are not affected by it, that the decree was based upon proper and sufficient evidence, of the execution of the assignment.

This Court adopts decisions of State Courts on such questions as are involved in this case.

This Court will defer to the decisions of the State Courts of Kentucky upon questions affecting the title to lands in that State, and will adopt their decisions upon the question of their jurisdiction, the regularity of their proceedings, &c.

Beauregard vs. *New Orleans*, 18 *How.*, 497.
Thatcher vs. *Powell*, 6 *Wheat.*, 127.
Elmendorf vs. *Taylor*, 10 *Wheat.*, 152.

And in the present case, this rule applies to the nature of the mortgagee's estate, his rights and remedies; and

to the propositions, that proceedings in foreclosure are proceedings *in rem.;* that where the mortgagee purchases in foreclosure, no deed is necessary ; and that evidence of possession is not indispensable to the admissibility of ancient deeds.

The papers on which the title of the plaintiffs depends.

If the plaintiffs have shown the admissibility of such of the foregoing rejected papers, *as are sufficient to make out their chain of title*, then the case must be sent back for a new trial, although it may appear that every other ruling of which we have complained was correct.

The deed from Charles Fleming to John and William Bryan (*Pr. rec.*, 183), and the record in *Clark* vs. *Conkling*, are the only direct links in their chain of title offered by plaintiffs which were rejected by the Court. The other papers are admissible on the grounds and reasons and for the collateral and auxiliary purposes heretofore stated, but even if it should be held that the other rejected papers were properly rejected, but that this deed and transcript should have been admitted, the plaintiffs can then make out their title, and the case should be reversed.

DAVID W. ARMSTRONG,
Attorney for Plaintiffs in Error.

The Statutes of Kentucky Bearing Upon the Questions in this Case.

ACT OF 1785.

In force from January 1, 1787.

An Act *for regulating Conveyances.*

"No estate of inheritance or freehold, or for a term of more than five years in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, sealed and delivered; nor shall such conveyance be good against a purchaser, for valuable consideration, not having notice thereof, or any creditor, unless the same writing be acknowledged by the party or parties who shall have sealed and delivered it, or be proved by three witnesses to be his, her or their act, before the general court, or before the court of that county, city or corporation, in which the land conveyed, or some part thereof, lieth, or in the manner hereinafter directed, within eight months after the time of sealing and delivery, and be lodged with the clerk of such court to be there recorded.

No covenant or agreement made in consideration of marriage shall be good against a purchaser for valuable consideration, not having notice thereof, or any creditor, unless the same covenant or agrement be acknowledged by the party bound thereby, or be proved by three witnesses to be his, her or their act; if land be charged before the general court, or the court of that county in which the land or part thereof lieth; or if personal estate only be settled, or covenanted or agreed to be paid or settled, before the court of that county in which such party shall dwell, or in the manner hereinafter directed, within eight months after the covenant or agreement made, or be lodged with the clerk of such court, to be there recorded.

If the party who shall sign or seal any such writing reside not in Virginia the acknowledgment by such party, or the proof by the number of witnesses requisite, of the sealing and delivering of the writing before any court of law, or the mayor or other chief magistrate of any city, town or corporation of the county in which the party shall dwell, certified by such court, or mayor or chief magistrate, in the manner such acts are usually authenticated by them, and offered to the proper court to be recorded, within eighteen months after the sealing and delivering, shall be as effectual as if it had been in the last-mentioned court."

1 Stat. Law of Ky., p. 432.

ACT OF 1792.

In force from its passage.

AN ACT *concerning relinquishment of dower, and recording letters of attorney. Approved December* 20, 1792.

"SEC. 1. *Be it enacted by the General Assembly*, That where any person is about to convey a tract of land, and resides in any other county than that in which the land doth lie, it shall and may be lawful for such person and his wife (if he has any) to acknowledge and subscribe a deed for the same, in the presence of two justices of the peace in the county where they reside, and such justices having previously examined the wife apart from her husband, whether she with her own free will and consent relinquish her right of dower in such lands, shall certify the same or the deed under their hands, and a copy of such deed shall be recorded in the court of the county within four months, and the clerk shall certify on the original deed that a true copy thereof hath been recorded in his office, and such deed shall in eight months thereafter be recorded in the court of the county in which the land shall lie, which shall be as lawful as if the said deed had been acknowledged or proved by the parties in open court; and the clerk, for recording a copy and a certificate on the original deed, may demand and receive six shillings, to be paid by the party or parties acknowledging the same, and to be collected as his other fees are by law paid and collected, but shall not receive the tax on such copy.

SEC. 2. *And be it further enacted*, That where the parties reside in any other State, and are about to convey any land lying within this commonwealth, it shall be lawful for them to proceed in like manner; except that a copy need not be recorded in the county where the parties reside; but the clerk of the county shall certify on the original deed that the person before whom such deed was acknowledged are justices of the peace and that due faith and credit is to be given to any act done by them, when acting in their official ecbaracter; and the seal of the county shall be affixed to such certificate, and such deed certified as aforesaid, shall be admitted to record within any county in this State where the land may lie, and shall be deemed as lawful as if the same had been acknowledged by the parties or proved in open court."

1 Stat. Law of Ky., p. 434.

ACT OF 1796.

In force from first January, 1797.

AN ACT *to reduce into one the several acts or part of acts for regulating Conveyances. Approved December* 19, 1796.

"SEC. 1. *Be it enacted by the General Assembly*, That no estate of inheritance or freehold, or for a term of more than five years in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared in writing, sealed and delivered, nor shall such conveyance be good against a purchaser for a valuable consideration, not having notice thereof, or any creditor, unless the same writing be acknowledged by the party or parties who shall have sealed and delivered it, or be proved by three witnesses to be his, her or their act in the office of the clerk of the court of appeals, of a district court, or in a court of quarter sessions or county court, in the manner prescribed by law, or in the manner hereinafter directed, within eight months after the time of sealing and delivery, and be lodged with the clerk of such court to be there recorded.

SEC. 2. (Covenants in consideration of marriage, when good.)

SEC. 3. If the party who shall sign and seal any such writing reside not in this Commonwealth, the acknowledgment by such party or the proof by the number of witnesses requisite, of the sealing and delivering of the writing before any court of law, or the mayor or other chief magistrate of any city, town or corporation of the county in which the party shall dwell, certified by such court, or mayor, or chief magistrate, in the manner such acts are usually authenticated by them, and offered to the proper court to be recorded within eight months, after the sealing and delivering, shall be as effectual as if it had been in the last-mentioned court."

1 Stat. Law of Ky., p. 437.

ACT OF 1831.

In force since its passage.

AN ACT *to amend the law regulating Conveyances. Approved January* 15, 1831.

"SEC. 10. *Be it further enacted*, That where deeds have been heretofore duly proven or acknowledged, or shall be hereafter so duly proven or acknowledged, but not lodged to be recorded in the proper office within the time prescribed by law, such deeds may, nevertheless, be recorded in the proper office, where they have not been recorded, and from the time of recording be as effectual to all purposes as if recorded within the time prescribed by law; and where any such deed has been recorded, but not within the time prescribed by law, copies of the record of the deed shall and may be used as evidence in the same manner as if it had been recorded within proper time."

1 Stat. Law of Ky., p. 450.

ACT OF 1796.

In force from first of January, 1797.

AN ACT, *directing the method of proceeding in Courts of Equity against absent debtors, or other absent defendants, and for settling the proceedings on attachments against absconding debtors. Approved December* 19, 1796.

"SEC. 1. If any suit shall be depending, or hereafter commenced in any court of chancery in this Commonwealth, against any defendant or defendants, who are out of this county, and others within the same having in their hands effects of, or otherwise indebted to such absent defendant or defendants, and the appearance of such absentees be not entered and security given to the satisfaction of the court for performing the decrees, upon affidavit, that such defendant or defendants are out of the county, or that upon enquiry at his, her or their usnal place of abode, he, she or they could not be found, so as to be served with process; in all such cases the said courts of chancery may make any order and require surety, if it

shall appear necessary, to restrain the defendants in this county from paying, conveying away, or secreting the debts by them owing to, or the effects in their hands of such absent defendant or defendants, and for that purpose may order such debts to be paid and effects delivered to the said plaintiff or plaintiffs upon their giving sufficient security for the return thereof to such persons and in such manner as ths court shall direct.

Sec. 2. The court shall also appoint some day in the succeeding term for the absent defendant or defendants, to enter his, her or their appearance to the suit, and give security for performing the decree, a copy of which order shall be forthwith published in the Kentucky *Gazette* or *Herald*, and continued for two months successively, and shall also be published on some Sunday, immediately after divine service, in such church or meeting-house as the court shall direct; and another copy shall be posted at the front door of the said court-house. If such absent defendant or defendants shall not appear and give such security within the time limited, or such further time as the court may allow them, for good cause shown, the court may proceed to take such proof as the complainant shall offer; and if they shall thereupon be satisfied with the justice of the demand, they shall order the bill to be taken as confessed, and make such order and decree therein as shall appear just, and may enforce due performance and execution thereof by such ways and means as hath heretofore been used for enforcing other decrees, requiring the plaintiff or plaintiffs to give such security as the court shall approve for abiding such future order as may be made for restoring the estate or effects to the absent defendant or defendants upon his or their appearance, and answering the bill; and if the plaintiff or plaintiffs shall refuse to give or not be able to procure such security, the effects shall remain under the direction of the court in the hands of a receiver, or otherwise for so long a time, and shall then be finally disposed of in such manner as to the court may seem just.

Sec. 3. (Absent defendant appearing within seven years after decree may petition to have the cause reheard. May answer the bill.)

Sec. 4. In all cases whatever where a suit is or shall be depending in any court of chancery, concerning any matter or thing whatever, against any absent defendant or defendants, the court may, on satisfactory proof to them made, that such defendant or defendants is, or

are out of this commonwealth, or that upon enquiry at his, her or their usual places of abode, he, she or they could not be found, make any order similar to that which is directed to be made in case of absent debtors adapting the same to the nature of the case; a copy of which order shall be published in like manner as is directed in case of absent debtors, and thereupon if the appearance of such absent defendant or defendants be not entered, the complainant may proceed in like manner as if an appearance had been entered: *Provided always*, That where such decree shall be made such absent defendant or defendants may at any time within seven years be permitted to file his, her or their answer and to show cause why the said decree should be set aside, upon which the courts may make such decree as shall appear to be equitable."

1 Stat. Law of Ky., p. 91.

ACT OF 1803.

In force from its passage.

AN ACT *to amend the act, entitled, "An act directing the method of proceeding in Courts of Equity, against absent debtors, or other absent defendants, and settling the proceedings on attachments against absconding debtors." Approved December* 22, 1803.

"SEC. 1. *Be it enacted by the General Assembly*, That so much of the said recited act as requires that a copy of the order of publication therein mentioned, directed to be made against the absentee, shall be posted up at the front door of the court-house, and that another copy shall be published on some Sunday immediately after divine service, at some church or other meeting-house door, be and the same is hereby repealed.

SEC. 2. *And be it further enacted*, That a certificate of the printer in whose paper the said order shall have been published agreeably to the said act, that it has been so done, together with a copy of said publication, shall be deemed and held sufficient evidence of that fact."

1 Stat. Law of Ky., p. 95.

117-225

Supreme Court U.S.
FILED.
FEB 25 1886
JAMES. H. McKENNEY.
CLERK.

United States Supreme Court.

OCTOBER TERM, 1885.

No. 140.

KATE APPLEGATE, WILLIAM APPLEGATE, HARRIET B. CLARK, CHARLOTTE HOLLINGSWORTH, MARTHA O. CLARK AND JAMES CLARK, PLAINTIFFS IN ERROR,

vs.

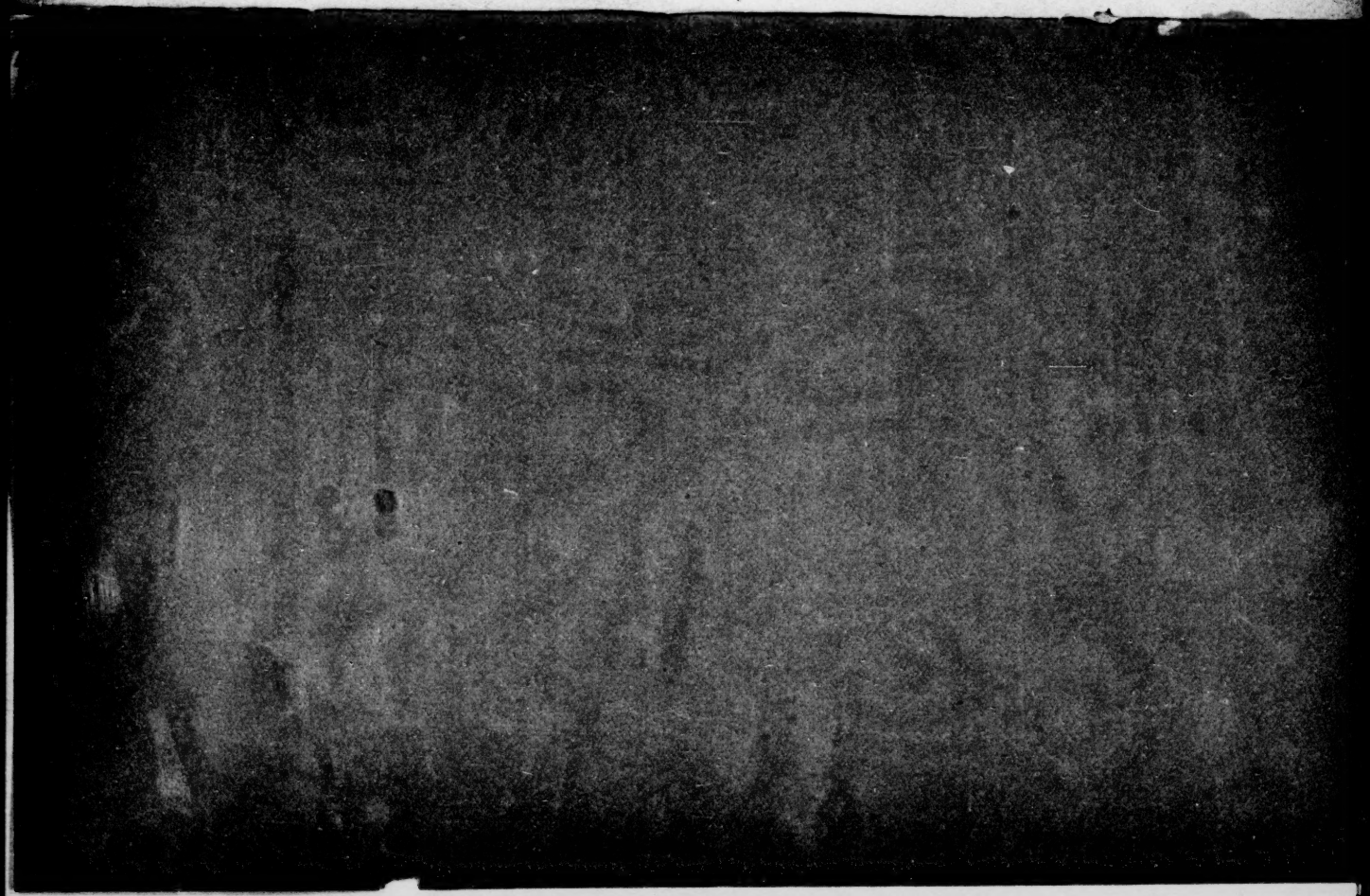
THE LEXINGTON AND CARTER COUNTY MINING COMPANY, THE NORTON IRON WORKS, THE EASTERN KENTUCKY RAILWAY COMPANY, W. W. CULBERTSON, THOMAS W. MEANS AND K. R. CULBERTSON, PARTNERS AS CULBERTSON, MEANS & CULBERTSON, CHARLES CONNOR, JOHN BAYSE AND SAMUEL T. MOORE, DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

BRIEF FOR PLAINTIFFS IN ERROR.

N. T. CRUTCHFIELD,
Counsel.

GRAY & CLARKSON, PRS.



In the Supreme Court of the United States.

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BRIEF FOR PLAINTIFFS IN ERROR.

CASE STATED.

The action in the circuit court to reverse the judgment in which this writ of error is prosecuted is in the nature of an action of ejectment to recover possession of a tract formerly in Mason county, Virginia, now situated in Greenup, Carter and Boyd counties, Kentucky. The plaintiffs in error are the plaintiffs in the action below. As to some of the defendants the suit has been compromised or voluntarily discontinued. The remaining defendants are made defendants in error.

The plaintiffs in their petition and amended petition allege that they are non-residents of the State of Kentucky; that they are the lineal heirs of Cary L. Clark, who died seized of a tract of 8,334 acres, part of a tract of 18,000 acres granted by patent from the commonwealth of Virginia, bearing date April 21, 1792, to Charles Fleming, from whom their ancestor, Cary L. Clark, derived title by a regular chain; that the plaintiffs are the owners and entitled to the possession of this land, which the defendants have unlawfully entered upon and wrongfully withhold.

The defendants by their several answers deny these allegations, and aver that they are seized of paramount title, and that the plaintiffs' cause of action did not accrue within the period of statutory limitation, which averments are put in issue by reply.

A trial upon the issues thus formed resulted in a verdict for the defendants, by instruction from the court based upon its ruling, refusing to permit certain documents constituting links in plaintiffs' chain of title to be read in evidence. Subsequently the court (the circuit judge presiding) reviewed this ruling and ordered a new trial.

After the new trial was ordered the plaintiffs greatly strengthened their evidence of title by the discovery of original documents, of which certified copies had been held inadmissible as evidence on the first trial.

On the second and last trial, held October 10, 1880, the judge of the district court presiding, the plaintiffs offered in evidence the following documents as links in their

Chain of Title:

1. A certified copy of a patent, dated 21st of April, 1792, from the commonwealth of Virginia to Charles Fleming, granting a tract of 18,000 acres in Mason county.

2. A deed purporting to be original from Charles Fleming to John and William Bryan, dated August 8, 1794, convey-

ing 13,300 acres, to be taken out of the tract of 18,000 acres described in the above-mentioned patent.

3. A certified copy of the will of Charles Fleming, dated October 8, 1793, and probated December 8, 1794, devising the said tract of 18,000 acres to William Fleming, John Bernard, Jr., and Richard Bernard, his executors, in trust, with power to sell the same.

4. A deed purporting to be original from William Fleming, John Bernard, Jr., and Richard Bernard, trustees under the will of Charles Fleming, to John Bryan, dated December 31, 1796, reciting the conveyance by their testator, Charles Fleming, of 13,300 of the 18,000 acres, and conveying to John Bryan the residue of said 18,000 acres.

5. A certified copy of a deed from John Bryan and William Bryan to Samuel Sackett, dated May 1, 1795, conveying 8,334 acres, part of the said tract of 18,000 acres, also another tract of 20,000 acres—in all 28,334 acres.

6. A deed purporting to be original from John Bryan and Samuel Sackett, dated 28th of January, 1797, conveying a quantity of land, including a tract of 20,000 acres and the above tract of 18,000 acres, excepting 28,334 acres, recited to have been previously conveyed by John and William Bryan to the grantee, Samuel Sackett.

7. A certified copy of a deed from Samuel Sackett to Joseph Conkling, Jr., and Samuel P. Lloyd, dated August 29, 1795, conveying 28,334 acres.

8. A certified copy of a mortgage from Joseph Conkling, Jr., and Samuel P. Lloyd to Samuel Sackett, mortgaging the tracts of 20,000 and 8,334 acres, respectively, to secure the payment of certain sums of money, and authorizing the mortgagee to sell the same in default of payment.

9. A certified transcript from the Mason circuit court of the record of the case of Cary L. Clark against Joseph Conkling and the heirs of Samuel P. Lloyd, deceased, instituted in the year 1798; in which the bill shows that complainant purchased the tracts of 20,000 and of 8,334 acres, described in

the mortgage above mentioned (No. 8 of this chain), from the mortgagee, Sackett; also an assignment to complainant of the said mortgage; and prays a foreclosure of the same. The record shows an interlocutory and final decree of foreclosure and a sale of the premises by commissioners to the complainant.

The court admitted in evidence of the foregoing documents:

The patent from the commonwealth of Virginia to Charles Fleming.

The will of Charles Fleming, (1);

The deed from Sackett to Conkling and Lloyd, (7); and

The mortgage from Conkling and Lloyd to Sackett, (8).

The bill of exceptions fails to show the introduction of the deed from John Bryan and William Bryan to Samuel Sackett, dated May 1, 1795, (5) which was offered in evidence, and this deed is referred to here merely as showing in regular sequence the chain of title relied on by the plaintiffs; the bill of exceptions, of course, not purporting to present all the testimony introduced. A copy of this deed appears, with other papers, on page 70 of the record.

The court, however, sustained the objections of defendants to—

The deed from Charles Fleming to John and William Bryan (2);

The deed from William Fleming and Bernards, trustees under the will of Charles Fleming, to John and William Bryan (4);

And the deed from John Bryan to Samuel Sackett (6)—the last three papers purporting to be original documents;

And also sustained defendants' objection to the transcript of the case of Clark against Conkling and Lloyd's heirs (9).

The rulings of the court excluding this evidence, and excluding certain evidence in support of the original documents, constitute the errors relied upon.

Evidence Supporting Original Deeds.

The three deeds above mentioned, offered as originals, have been certified to this court and are now in custody of the clerk.

It was proven in support of these deeds that shortly before the trial at which they were offered in evidence they were found by one of plaintiffs' attorneys at the clerk's office of the Greenup circuit court among the papers of the case of Hughes against Shores' heirs, an old suit instituted in that court on the 15th of July, 1815, and they were produced together with the papers of that suit by a clerk of the Greenup circuit court in obedience to a subpœna *duces tecum*. The papers of this old case of Hughes against Shores' heirs were ordered by the court to be copied and incorporated in the bill of exceptions, and they appear in the record from page 64 to line 16, page 150, inclusive. The bill in that case, (Record, page 90), brought by the complainant Hughes to quiet title, shows that the complainant derived title to the lands in controversy through the deed from William Fleming and John and Richard Bernard, trustees under the will of Charles Fleming to John Bryan, and the deed from John Bryan to Samuel Sackett. The bill also shows that the complainant "will be ready to produce the said patent and deeds, showing the deduction of title in proper time, or whenever the court shall require it."

These two deeds referred to in the bill of Hughes correspond with and appear to be identical with the two deeds (4 and 6) of plaintiffs' chain of title offered in evidence as originals, which were found among and produced with the other papers of the case, and their custody among the files of this old case is thus explained.

The deed from Fleming and Bernards, trustees under the will of Charles Fleming, to John Bryan, recites the execution of the deed from Charles Fleming to John and William Bryant, conveying 13,300 acres, which quantity is excepted

from the land conveyed by said trustees to John Bryan, and the recitals of both deeds mutually support each other. The relevancy of this original deed from Charles Fleming to John and William Bryan (2) as evidence in the case of Hughes against Shores' heirs thus appears, and the custody of this remaining original document is explained.

In further support of these deeds as originals the plaintiffs introduced certified copies from the Greenup county court clerk's office of a report of land commissioners, made October 18, 1810, upon the application of James Hughes, which divided the 18,000-acre tract patented to Fleming, and set apart to Hughes 9,000 acres of said tract; also copy of a deed from said commissioners conveying to Hughes the 9,000 acres so set apart, in which report and deed it is recited that Hughes derived his title through and by virtue of the deed from John Bryan to Samuel Sackett; also copies of a series of deeds from 1820 down to 1853, showing conveyances of portions of this land derived through the said deed to Hughes and the said original deeds offered in evidence. Evidence was also introduced showing possession, by persons claiming under these conveyances, of portions of said 18,000 tract, and showing settlements of divers persons on portions of said lands by and under one James Howe, who derived his title through the said Hughes. Plaintiffs further offered to prove in support of the deed from Fleming and Bernards to John Bryan, and the deed from John Bryan to Samuel Sackett, that there were recorded in the clerk's office of the Kentucky Court of Appeals in the year 1816 deeds identical in terms with these papers, for the purpose of corroborating the genuineness of the certificate of the clerk of the Court of Appeals indorsed on these deeds that the same were recorded in his office in that year. The court sustained defendants' objections to this last supporting testimony as to the deed from William Fleming and the Bernards to John Bryan, but no objection appears to have been made to this testimony as offered in support of the deed from John Bryan to Samuel

Sackett, and this evidence was admitted in support of the latter deed. The court thereupon sustained the objection and refused to admit these deeds as originals.

In support of the deed from Charles Fleming to John and William Bryan, offered as an original, the same supporting testimony was introduced which was offered in support of the original deeds from William Fleming and the Bernards, trustees to John Bryan, and from John Bryan to Samuel Sackett, except as to its being recorded in the office of the court of appeals of Kentucky, but in further support of this latter deed the clerk of the county court of Mason county, Kentucky, was introduced as a witness, bringing with him the deed book containing deeds recorded in the year 1794, and plaintiffs offered to prove that there was recorded in this deed-book an instrument identical in terms with the deed from Charles Fleming to John and William Bryan, this evidence being corroborative of the certificate indorsed on the deed,—that the same was ordered to be recorded by the Mason county court. The court sustained the defendants' objections to this last mentioned supporting testimony, but permitted plaintiffs to introduce in support of the original a certified copy from the Mason county court; and, also sustained the objection to this deed offered in evidence as an original; and to these several rulings the plaintiff excepted.

Transcript—Clark vs. Conkling.

The transcript, (9)—in the above chain of title,—of the record in the suit of Cary L. Clark against Conkling and Lloyd's heirs,—in which the complainant alleges an assignment to him by Samuel Sackett of the mortgage from Conkling and Lloyd to Sackett, also mentioned in the above chain (8), and which showed a decree of foreclosure and sale to the complainant Clark,—was objected to by the defendants, and it was urged against its admissibility that the record failed to show that the order warning the defendants to appear was

published as directed by the order. The record showed that the order warning the defendants to appear was entered in conformity to the statute then existing; that at the time fixed by the order for the defendants to appear the bill was taken for confessed, and an interlocutory decree of foreclosure entered. The subsequent proceedings show a final decree of foreclosure and a report of sale of the premises to the complainant to have been filed. In support of the competency of this record, the assistant librarian in the public library at Lexington was introduced, having with him printed newspapers appearing to be of great age and appearing to be original files of the Kentucky *Gazette*, published weekly, for the years 1798 and 1799, and it was shown in nine successive issues of this weekly newspaper that there were publications beginning with December 12, 1798, and ending February 7, 1799, of the following order, which is identical in terms with that appearing in the transcript offered in evidence:

STATE OF KENTUCKY, *Washington District:*

November Term, 1798.

CARY L. CLARK, complainant, *against* JOSEPH CONKLING, JR., and William Lloyd, Thomas Lloyd, Abigail Lloyd, Betsy Lloyd, Thomas Lloyd, heirs and representatives of Samuel P. Lloyd, deceased, defendants.	In Chancery.

The defendants not having entered their apppearance agreeably to an act of assembly and rules of this court, and it appearing to the satisfaction of the court that they are not inhabitants of this commonwealth, on the motion of the complainant, by his attorney, it is ordered that the defendants appear here on the third day of our next term and answer the complainant's bill; and that a copy of this order be inserted in the Kentucky *Gazette* or *Herald* for two months, successively; another posted at the door of the court-house of Mason county; and that this order be published some

Sunday at the door of the Baptist meeting-house in Washington.

A copy. Teste: FRANCIS TAYLOR, *C. W. D. C.*

Published Dec. 12th, 19th, 26th, y'r 1798; Jan'y 2d, 9th, 16th, 24th, 31st; Feb'y 7th, y'r 1799.

The court, however, sustained the defendants' objection and refused to permit this transcript to be given in evidence, and to this ruling the plaintiffs excepted.

ASSIGNMENT OF ERRORS.

The plaintiffs in error assign and rely upon as errors the following rulings of the circuit court:

First. Refusing to permit plaintiffs to read in evidence a deed purporting to be the original of a deed from Charles Fleming and John and William Bryan, bearing date 8th of August, 1794, and conveying to the grantees the quantity of 13,300 acres of land, to be taken out of the tract of 18,000 acres patented to the grantor, Charles Fleming, by the Governor of Virginia, situated in Mason county, on the waters of the Ohio, and including the tract described in the petition of plaintiffs. (Record, 181.)

Second. Refusing to permit plaintiffs, in support of the competency of the paper purporting to be an orginal deed from Charles Fleming to John and William Bryan, dated August 8, 1794, mentioned in the preceding error, to prove by the clerk of the Mason county court and by the deed-book of the Mason county court, produced by said clerk, containing deeds recorded in 1794, and several years thereafter, that there was recorded in said deed-book a deed identical in terms with the aforesaid deed. (Record, 181.)

Third. Refusing to permit the plaintiffs to read in evidence a paper purporting to be the original of a deed from William Fleming and John and Richard Bernard, trustees under the will of Charles Fleming, to John Bryan, bearing date December 31, 1796, and conveying to the grantee the remainder of the tract of 18,000 acres, patented to Charles Fleming, left after deducting the 13,300 acres conveyed to John and William Bryan by Charles Fleming by the deed referred to in the first error above assigned. (Record, 170.)

Fourth. Refusing to permit plaintiffs to prove, in support of the competency of the deed from William Fleming and John and Richard Bernard, trustees to John Bryan, mentioned in the next preceding error, that there was recorded in the deed-book of the clerk's office of the Court of Appeals of Kentucky, containing deeds recorded in the year 1816, a deed identical in terms with the aforesaid paper purporting to be original. (Record, 170.)

Fifth. Refusing to permit plaintiffs to read in evidence a paper purporting to be the original of a deed from John Bryan and wife to Samuel Sackett, bearing date 28th of January, 1797, conveying four several tracts of land, containing in all 63,791 acres, including a tract of 18,000 acres, patented to Charles Fleming by the commonwealth of Virginia, which embraces the tract of 8,334 acres mentioned in the petition of plaintiffs, but excluding from its operation 28,334 acres thereof, recited to have been previously conveyed to said Samuel Sackett by William Bryan and the said grantor, John Bryan. (Record, 178.)

Sixth. Refusing to permit plaintiffs to read in evidence a certified copy, from the clerk's office of the Kentucky court of appeals, of the deed mentioned in the next preceding error; the said paper containing a certificate by Robert Blair and William McEwen, justices of the peace for Somerset, New

Jersey, that the said deed was acknowledged before them by the said grantors; also a certificate by Fred Frelyinghuysen, clerk of said Somerset county, that Robert Blair and William McEwen, whose names were subscribed to the above certificate, were justices of the peace for Somerset county; also a certificate by Sneed, clerk of the Court of Appeals of Kentucky, that the said deed with the testimonials thereto annexed was produced in his office on the 7th day of July, 1816, and the same duly recorded. (Record, 174.)

Seventh. Refusing to permit plaintiffs to read in evidence a certified transcript from the Mason circuit court of the proceedings and papers in the case of Cary L. Clark, Joseph Conkling, and others. (Record, 185 to 199.) The bill in this case shows that the defendants Joseph Conkling and S. P. Lloyd executed to Samuel Sackett a mortgage whereby they conveyed 8,334 acres, part of the 18,000 acres in Mason county patented to Charles Fleming to secure the payment of a certain bond executed to Sackett, and empowered Sackett upon default of payment to sell at public auction and convey the mortgaged lands to the highest bidder; that Sackett, in pursuance of the terms of this instrument, sold the mortgaged lands to the complainant Clark, and executed to said Clark in the name and in behalf of Joseph Conkling and S. P. Lloyd a deed conveying said lands; that before said sale said S. P. Lloyd died, leaving certain named heirs who are made defendants; that said Sackett assigned to the complainant Clark by deed of assignment the mortgage from Conkling and Lloyd; that the debt secured by the mortgage was unpaid, and concludes with a prayer for a foreclosure. The mortgage from Conkling and Lloyd to Sackett, the deed from Sackett to Clark, and the assignment of the mortgage from Sackett to Clark are made exhibits with the bill, and appear at length in the transcript. The transcript shows the following proceedings, to wit: A subpœna sued out against the defendants was returned,

"No inhabitant of this commonwealth," and on the 20th day of June, 1798, an order was entered by the court warning the defendants to appear on the 3d day of the next term and answer the complainant's bill and directing its publication. At the rules on the third Wednesdays of June, July, August, September, October, and November in the year 1798, this cause was continued. At a court held on the 24th November, 1798, an alias order was entered similar in terms to the previous order of 20th June, as follows:

"The defendants not having entered their appearance agreeably to an act of assembly and the rules of this court, and it appearing to the satisfaction of the court that they are not inhabitants of this commonwealth, on the motion of the complainant by his attorney it is ordered that the defendants appear here on the third of our next term and answer the complainant's bill, and that a copy of this order be inserted in the Kentucky *Gazette* or *Herald* for two months successively, another posted at the door of the court-house of Mason county, and that the order be published some Sunday at the door of the Baptist meeting-house in Washington."

At the rules on the third Wednesday in December complainant filed his bill in substance as above stated. At the rules in January, 1799, this cause was continued for answer. At the rules in February, 1799, the bill was taken *pro confesso*. At the rules in March, 1799, this cause was set for hearing at the next court. At a court held on 19th June, in the year aforesaid, "came the complainant by his attorney, and all and singular the papers and exhibits being heard, the complainant's bill is taken as confessed," and an interlocutory decree *nisi* foreclosing the mortgage was entered, giving the defendants time to the 19th day of November, 1799, in which to pay the mortgage debt.

At the November term, 1799, the following order was entered:

"By consent it is ordered that this suit be continued until the next term."

At a court held on the 8th of February, 1800, another interlocutory decree was entered, giving the defendants until the first day of March, 1800, within which to pay the mortgage debt, and directing that on default the mortgage be foreclosed and the premises sold at public auction by commissioners of the court.

In November, 1809, this suit was redocketed in the Mason circuit court and continued until the next term. On the 22d of August, 1810, a decee was entered, reciting the previous interlocutory decree of the district court and the report of sale made thereunder, in which it appeared that the complainant became the purchaser of the mortgaged lands sold pursuant to the decree; and thereupon finally foreclosing the equity of redemption of the defendants in the mortgaged lands, and ordering a conveyance of the same to the complainant.

ARGUMENT.

ANCIENT DEEDS.—COMPETENT EVIDENCE.

Deeds, apparently genuine, purporting to be original, and to have been executed more than 80 years, found among the papers of a suit instituted over 60 years prior to their discovery, in which suit they were relevant evidence, and referred to as exhibits, are competent evidence without proof of their execution; and especially when supported by proof that they were deposited for record and recorded shortly after their execution, and by proof of possession and conveyance by persons claiming under them.

Greenleaf's Evidence, secs. 21, 570, 144 *and notes and cases cited.*

Burgin vs. *Chenault*, 9 *B. Mon.*, 286.

Hedger vs. *Ward*, 15 *B. Mon.*, 114.

The first six errors assigned relate to the admissibility of certain ancient deeds offered by the plaintiffs in evidence as original documents—namely, deed from Wm. Fleming and John and Richard Bernard, trustees under the will of Charles Fleming to John Bryan (Rec. 58), the deed from John Bryan and wife to Samuel Sackett (Rec. 178), and the deed from Charles Fleming to John and William Bryan (Rec. 183), and to the admissibility of certain evidence offered in their support. The questions arising respecting the competency of each of these three deeds being substantially the same, these errors may be considered together.

In support of these deeds it was proved that they were found in the custody of the Greenup circuit court clerk, among the papers in the case of Hughes *vs.* Shores' heirs, an old case in that court which was instituted in 1816, the papers of which were ordered by the court below to be copied into the bill of exceptions and appear at length in the record from page 64 to the line "Original Deed, Mills to Hughes, for said moiety," on page 150, inclusive.

A slight examination of the papers of this case of Hughes *vs.* Shores' heirs shows beyond a question the appropriateness of the custody in which these deeds were found. The bill in that case (Rec. p. 90), being a bill to quiet title, shows that complainant's title is derived through the deed from Wm. Fleming and John and Richard Bernard to John Bryan, and the deed from John Bryan and wife to Samuel Sackett, and that the complainant will be ready to produce these deeds whenever required.

The deeds here referred to correspond and appear to be the same with those offered in evidence as originals. The former of these two deeds refers to and recites the previous conveyance by Charles Fleming to John and William Bryan of an undivided quantity of land which is excepted from these conveyances. This latter deed from Charles Fleming, which was found in the same custody, thus explains and defines the premises conveyed in the former deeds, and must, therefore,

have been relevant evidence in the suit of Hughes *vs.* Shores' heirs. Here, then, among the papers of this old suit commenced more than 70 years ago, are found these ancient documents, two of which are the muniments, and the other relevant evidence of complainant's title. It is difficult to conceive how the custody of ancient documents could be more reasonable. The instruments themselves, which are certified to this court for inspection, are the best evidence of their antiquity and genuineness, and it would seem that plaintiffs might have safely rested their proof without further corroboration. But in addition to this, proof was offered that one of these deeds, viz, from John Bryan to Samuel Sackett, was admitted to record in the clerk's office of the Court of Appeals of Kentucky, in the year 1816, in which office conveyances of land in any part of the State were then authorized by law to be recorded. (Rec. 178.)

The same proof as to the recording of the deed from William Fleming and John and Richard Bernard to John Bryan in the same year, 1816, was offered, but the court refused to permit its introduction. (R. 150.)

Plaintiffs likewise offered to prove, as to the deed from Charles Fleming to John and William Bryan, by the deed-book of the Mason county clerk's office, containing deeds recorded in 1794, which was produced by the clerk on the trial, that there was recorded therein a deed identical in terms with that offered in evidence; but the court refused to permit this proof to be made. (R. 181.) It, however, allowed to be read a certified copy, from the Mason county clerk's office, of this deed which was there recorded. (R. 181.)

The deed from John Bryan to Samuel Sackett was further supported by evidence, which was admitted, of conveyances of land, title to which was derived through it, and possession of portions of the premises under these conveyances. This evidence comprised the following documents:

A certified copy from Greenup county court clerk's office of a report of land commissioners, made Oct. 18th, 1810, upon the

application of James Hughes, dividing the tract of 18,000 acres patented to Fleming, and described in said ancient deed, according to the following provisions of an "Act to amend an act entitled an act to reduce into one the several acts for the conveyance and division of lands," approved Dec. 16th, 1802 (*Morehead and Brown, Dig. Laws of Ky., vol.* 1, 458):

Sec. 2. "That persons having claims to lands in this commonwealth, undivided, as locators, or by bond or other instrument of writing, as well residents as non-residents, *feme coverts* or infants, may have the same divided by any two of the commissioners appointed by the court agreeable to the said recited act, and such commissioners shall convey to the person or persons having the equitable claim the part to which they may be entitled, to be recorded in the county where the land shall lie, together with the bond or instrument of writing, agreeable to which the division was made, to be recorded with the deed, which deed of conveyance shall effectually vest the legal title in such person."

The report recites the application of Hughes, and that he produced a deed "from Peter Mills of Zanesville, in the State of Ohio, for one undivided moiety of 18,000 acres of land in the county granted by patent from the then Governor of Virginia to Chas. Fleming on the 21st day of April, 1792, conveyed by the said Fleming to Jno. Bryan, by Jno. Bryan to Samuel Sackett, of the city of New York, by Samuel Sackett to his trustees, by the trustees to Samuel Beebee, and by the said Samuel Beebee to Alexander Caldwell of Brooke City, Virginia, and one of the undivided moiety thereof by the said Alexander Caldwell to the said Peter Mills;"—and sets apart to Hughes 9,000 of said 18,000 acres; (Rec. 150–1.)

Also a copy of a deed from the commissioners conveying the 9,000 acres so set apart; in which deed it is recited that Hughes derived his title through deeds from Fleming to Bryan and from Bryan to Sackett; (R. 152.)

Also copy of a deed from the sheriff of Greenup to William McConnell, dated October 14th, 1820, conveying the interest of the heirs of James Hughes in the said 9,000 acres by virtue

of a writ of *fieri facias*, and in pursuance of a sale thereunder; (R. 154.)

Also copies of the following deeds, to wit: from McConnell to James Howe, dated January 15th, 1822 (R. 156); from James Howe's heirs to Alex. Campbell, dated Dec. 13th, 1847 (R. 158); from Alex. Campbell to T. D. White, Feb'y 7th, 1848 (R. 161); from G. W. Howe to Wilson Culbertson & Co., July 5th, 1851 (R. 163); from John Y. Montgomery et al. to Wilson Baird & Co., dated April, 1853 (R. 164); from James Howe to John Y. Montgomery, dated Jan'y 1st, 1838 (R. 166), and from Daniel B. Howe to Wilson Culbertson & Co., dated Nov. 11, 1850 (R. 167); by which several deeds portions of said 9,000 acres set apart to James Hughes of the Fleming 18,000 acres successively passed.

Evidence was also introduced showing possession by James Howe of portions of this 18,000 acre tract; also evidence of sales of portions thereof, in addition to those shown by the above-mentioned deeds; also evidence showing settlements of various persons on portions of this land by and under James Howe.

It seems to be well settled that a deed more than 30 years old, if it comes from such custody as to offer a reasonable presumption in favor of its genuineness, is admissible as evidence without proof of its execution. If, in addition to this, proof is made of acts done or of possession under title derived through such deeds, the presumption of execution is correspondingly strengthened, though the latter condition appears not to be absolutely essential to the admissibility of the deed as evidence.

Greenleaf's Evidence, sec. 21 *and note, sec.* 144 *and note, sec.* 570 *and note.*

In a note to *sec.* 144 of the work just cited, *14th edition*, it is said:

"A graver question has been whether the proof of possession is indispensable, or whether its absence may be sup-

plied by other satisfactory corroborative evidence. In Jackson de *Lewis* vs. *Laroway*, 3 *Johns. Cas.*, 283, it was held by Kent, J., against the opinion of the other judges, that 'it was indispensable,'" citing several authorities. "'But the weight of authority at present seems clearly the other way; and it is now agreed that, where proof of possession cannot be had, a deed may be read if its genuineness is satisfactorily established by other circumstances;'" citing a number of cases, among them, *Barr* vs. *Gratz*, 4 *Wheat.*, 213, 221, and *Hewlett* vs. *Cock*, 7 *Wend.*, 371.

In *Burgin* vs. *Chenault*, 9 *B. M*, 286, it was held by the Kentucky court of appeals that a deed purporting to be 40 years old, with evidence of possession under it, would be unquestionably competent; the court adding, "and we do not decide that it would not have been so without it."

So in *Hedger* vs. *Ward*, 15 *B. Mon.*, 114-115, it was held without qualification that a deed nearly 50 years old, produced by the heir of the grantee, was competent evidence of his title; although the point was made by counsel that there was no evidence of sufficient possession under it.

In *Greenleaf*, *sec.* 570, after referring to the rule that documents thirty years old prove themselves, it is said:

"But such documents must be free from any grounds of suspicion, and must come from the proper custody, or have been acted upon so as to afford some corroborative proof of their genuineness; citing *Goodwin* vs. *Jack*, 62 *Me.*, 414; *Johnson* vs. *Shaw*, 41 *Tex.*, 428.

And in a note to the same section, citing several authorities:

"In some cases proof of possession under the deed or will seems to have been deemed indispensable; but the principle pervading them all is that of corroboration merely, that is, that some evidence shall be offered auxiliary to the apparent antiquity of the instrument to raise a presumption in its favor."

In view of the text above cited, it would seem that the evidence offered, that two of these deeds were deposited for record, and recorded in 1816, and the other recorded in 1794, shortly after its execution, was clearly competent as showing

that these instruments were acted upon by persons claiming title under them, and the refusal of the court to admit this evidence was therefore erroneous.

For the purposes of this case it matters not whether proof of possession under ancient deeds is indispensable to their competency as evidence or not. Ample proof has been made of possession under title derived through two of these deeds, and the recitals of these two are evidence of the execution of the third.

The only ground suggested by the court below for excluding these old deeds was that the custody from which they were produced was not entirely satisfactory.

They were found among and produced with the papers of a case in which they were evidence and links in complainant's chain of title, and two of them expressly relied on in the complainant's bill to quiet title. The evidence of these documents was necessary and essential to the case in which they were found, and it seems to me proper to add on this point but little to a bare statement of the case.

Every reasonable circumstance, corroborative of the presumption of their execution, is supplied by the proof in this case. They are certified to this court for inspection, and no comment is needed upon the manifest antiquity and apparent genuineness of these parchments.

The seventh and last error relied upon by the plaintiffs in error is the refusal of the Circuit Court to admit in evidence the transcript of record of the case of Cary L. Clarke *vs.* Joseph Conkling, Jr., and S. P. Lloyd's heirs, instituted in the Washington District Court, and afterward transferred to the Mason Circuit Court.

It was objected on the part of the defendants in error that this record failed to show any service of process upon or appearance of defendants to that suit, or any proof of the publication of the order warning the defendants to appear, and that the proceedings and decree were therefore inoperative and void.

In answer to this objection we submit the following propositions:

When the judgment of a superior court of general jurisdiction, having jurisdiction of the subject-matter in a proceeding *in rem*, is brought in question collaterally, and the record is silent as to the actual or constructive service of process, the jurisdiction or right of the court to render its judgment will be presumed until the contrary appears;

And that,

The Washington District Court, being a superior court of general jurisdiction, having jurisdiction of the lands described in the decree in the suit of Clarke *vs.* Conkling and others, and an order of warning having been duly entered in compliance with law against the defendants as non-residents, but the record being silent as to the publication of the order, it will be presumed that the publication was made, and that the Court had jurisdiction to render its decree to the extent of subjecting the land in controversy.

In support of these propositions I ask the attention of the court to the following

Points of law and fact,

which will be considered in the progress of this brief:

I.

The Washington District Court was a court of general common law and equity jurisdiction, and the territorial limits of its jurisdiction included the County of Mason, in which the land, the subject-matter of the suit, was situated.

Act to Establish District Courts, approved December 19th, 1795, *Littell's Laws of Kentucky, vol.* 1, *p.* 300.

II.

The statute of Kentucky then in force authorized proceedings against non-resident defendants by publication of warning orders.

Act Prescribing the Method of Proceeding in Courts of Equity Against Debtors, &c., approved December 19th, 1796. *M. & B. Digest Laws of Kentucky—Title, Absent Defendants.*

III.

The statute authorizing proceedings by publication did not prescribe the mode of proving that the publication had been made, and the practice then prevailing seems to have been to allow such proof to be made orally in court, by an inspection of the newspaper, or by the oath of some one who had knowledge of the fact, or otherwise, as might be satisfactory to the court.

Bustard vs. *Gates*, 4 *Dana*, 430.
Green vs. *Breckinridge*, 4 *Mon.*, 543.
Jeffries' Heirs vs. *Callis*, 4 *Dana*, 466.

IV.

The law not prescribing manner of proof nor directing that it appear in writing, it will be presumed, nothing to the con-

trary appearing, that satisfactory proof was made to the court of the publication of the order of warning before the decree was rendered.

Bustard vs. *Gates*, 4 *Dana*, 430.
Shackelford vs. *Miller*, 9 *Dana*, 277.
Jeffries vs. *Callis*, 4 *Dana*, 466.

V.

The record shows that the warning order in Clarke *vs.* Conkling and al. was obtained and issued in strict conformity to the statutory requirements, and that the proceedings were regularly conducted to a final decree of foreclosure.

Record, 183–191.

VI.

The District Court, being a superior court of equity as well as law, had jurisdiction *in rem*, independently of special statutory authority in proceedings against non-residents.

Ferrill vs. *Combs*, 7 *J. J. Mar.*, 247.

VII.

The proceedings and the decree foreclosing the mortgage, so far as it subjected the land, were essentially *in rem*.

Jackson vs. *Speed*, 2 *Duv.*, 248.
Boswell's Lessee vs. *Otis*, 9 *How.*, 348.
Pennoyer vs. *Neff*, 5 *Otto*, 734.

VIII.

Judgments of superior courts are aided by favorable presumptions when the record is silent as to jurisdictional facts.

And, as to proceedings substantially *in rem*, when the jurisdiction over the subject-matter is unquestioned, the jurisdiction or right of the court to render its judgment will, when

the record is collaterally attacked, be presumed, nothing to the contrary appearing.

Voorhees vs. *Bank of U. S.*, 10 *Pet.*, 449.
Grignon's Lessee vs. *Astor*, 2 *How.*, 219.
Cooper vs. *Reynolds*, 10 *Wal.*, 308.

Kentucky cases:

Shackelford vs. *Miller*, 9 *Dana*, 277.
Bustard vs. *Gates*, 4 *Dana*, 430.
McIlroy vs. *Speed*, 4 *Bibb*, 87.
Davis vs. *Connelly*, 4 *B. M.*, 137.
Dorsey vs. *Kendall*, 8 *Bush*, 299.
Jacobs vs. *L. & N. R. R.*, 10 *Bush*, 270-71.
Newcomb's Ex'rs vs. *Newcomb*, 13 *Bush*, 544.

Also:

Homer vs. *State Bank*, 1 *Ind.*, 130.
Foot vs. *Stephens*, 17 *Wend.*, 483.
1 *Smith's Leading Cases, part* 2, 1020.
Id., 1021.
Cooley's Const. Lim., 406.
Moore vs. *Starks*, 1 *Ohio Stat.*, 369.
Reynolds vs. *Stansberry*, 20 *Ohio*, 344.
Grainger vs. *Clark*, 22 *Me.*, 128.
Trimble vs. *Longworth*, 13 *Ohio St.*, 438.
McCahill vs. *Equitable Assurance Society*, 26 *N. J.*, 536.
Coit vs. *Haven*, 30 *Conn.*, 197-98.
Hahn vs. *Kelly*, 34 *Cal.*, 391.

IX.

If, however, the fact that the subject-matter or *res* was within the jurisdiction of the court is denied when the record is collaterally introduced, the presumption of jurisdiction may be rebutted by evidence, and even recitals of the judgment contradicted.

Thompson vs. *Williams*, 18 *Wall.*, 457.

But the onus of establishing a want of jurisdiction is upon the party attacking the record.

Thompson vs. *Williams*, and authorities cited under Point VIII.

X.

The presumption of publication was in this case corroborated as far as possible by the production in evidence of the original files of the old newspaper in which it was made (R , 199). Publication at the church and at the court-house door was not susceptible of such proof, and is to be presumed.

I. *The Washington District Court a superior court having jurisdiction of the subject.*

The Washington District Court was a superior court of general common law and equity jurisdiction, and its territorial jurisdiction included the County of Mason, in which the land, the subject-matter, was situated.

By an act of the General Assembly of Kentucky, entitled "An act to establish district courts in this Commonwealth," approved December 19th, 1795, (*Littell's Laws of Kentucky, vol.* 1, *p.* 300), it was enacted:

SECTION 1. That the original jurisdiction of the Court of Appeals shall be, and the same is hereby, taken away.

SEC. 2. That this Commonwealth be divided into districts, and a superior court holden in each. * * * The counties of Mason and Campbell shall constitute another district.

SEC. 8. The jurisdiction of the said district courts, respectively, shall be over all persons and in all causes, matters, and things at common law or in chancery arising within their districts, excepting suits for slander and subjects of controversy of less than fifty pounds in value.

II. *The laws of Kentucky authorized constructive service of process by publication.*

By an act entitled "An act directing the method of proceeding in courts of equity against absent debtors and other absent defendants," approved December 19th, 1796, *Morehead & Brown's Digest,—Title, Absent Defendants*, it was enacted:

SECTION 1. If any suit shall be depending, or hereafter commenced, in any court of chancery in this Commonwealth against any defendant or defendants who are out of this country, and others within the same having in their hands effects of or otherwise indebted to such absent defendant or defendants, and the appearance of such absentees be not entered and security given to the satisfaction of the court for performing the decrees, upon affidavit that such defendant or defendants are out of the country, or that, upon inquiry at his, her, or their usual place of abode, he, she, or they could not be found so as to be served with process; in all such cases the said court of chancery may make any order and require surety, if it appear necessary to restrain the defendants in this country from paying, conveying away, or secreting the debts by them owing to, or the effects in their hands of such absent defendant or defendants, and for that purpose may order such debts to be paid or effects delivered to the said plaintiff or plaintiffs upon their giving sufficient security for the return thereof to such persons and in such manner as the court shall direct.

SEC. 2. The court shall also appoint some day in the succeeding term for the absent defendant or defendants to enter his, her, or their appearance to the suit, and give security for performing the decree, a copy of which order shall be forthwith published in the Kentucky *Gazette* or *Herald*, and continued for two months successively, and shall also be published on some Sunday, immediately after divine service, in such church or meeting-house as the court shall direct, and another copy shall be posted at the front door of the said court-house.

SEC. 4. In all cases whatever where a suit is or shall be depending in any court of chancery, concerning any matter or thing whatever against any absent defendant or defend-

ants, the court may, on satisfactory proof to them made that such defendant is or are out of this Commonwealth, or that, upon inquiry at his, her, or their usual place of abode, he, she, or they could not be found, make any order, similar to that which is directed to be made in case of absent debtors, adapting the same to the nature of the case; a copy of which order shall be published in like manner as is directed in case of absent debtors, and thereupon, if the appearance of such defendant or defendants be not entered, the complainant may proceed in like manner as if an appearance had been entered: *Provided, always*, that when such decree shall be made such absent defendant or defendants may, at any time within seven years, be permitted to file his, her, or their answer, and to show cause why the decree should be set aside, upon which the courts may make such decree as shall appear to be equitable.

III. *The statute not prescribing the mode of proving publication, oral proof competent.*

IV. *Satisfactory proof of publication presumed, nothing to the contrary appearing.*

V. *The warning order issued in conformity to the statute and the proceedings to final judgment regular.*

The proceedings in the case of Clarke *vs.* Conkling and Lloyd's heirs were conducted as follows:

On the 13th of June, 1798, the complainant procured a subpœna against defendants, returnable at its next term, which was returned in the following words: "No inhabitant of this Commonwealth." On a day of the ensuing term, June 20th, 1798, an order was entered warning the defendant to appear, and directing the publication of the order in pursuance of the statute above recited. (Record, 185–86.)

By this order the defendants were cited to appear on the third day of the next term, which commenced on the third

Monday of November, 1798, as provided in the following act:

An Act Prescribing the Time of Holding Courts in the Washington District. Approved November 16th, 1798. (*Littell's Laws, vol.* 2, *p.* 184.)

SECTION 1. That the district courts for said district shall be held on the third Mondays in the months of February, June, and November, annually, any law to the contrary notwithstanding.

SEC. 2. That all proceedings of the said court at their last two terms shall be, and the same are hereby, ratified and confirmed, as fully as if the same had been held and done at the terms prescribed by law, and not further or otherwise.

At the rules held on the third Wednesday in the months of June, July, August, September, October, and November, in the year 1798, this cause was continued. (Rec. 186.) At a court held for this district—evidently its regular term—on the 24th of November, 1798 (it no doubt appearing, although not stated, that the previous order of warning had not been published as directed), in conformity with the statute the following order was entered:

"The defendants not having entered their appearance agreeably to an act of the assembly and the rules of this court, and it appearing to the satisfaction of the court that they are not inhabitants of this Commonwealth, on the motion of the complainant, by his attorney, it is ordered that the defendants appear here on the third day of our next term and answer to the complainant's bill, and that a copy of this order be inserted in the Kentucky *Gazette* or *Herald* for two months successively, another posted at the door of the courthouse of Mason county, and that the order be published some Sunday at the door of the Baptist meeting-house, in Washington." (Rec. 188.)

At the rules on the third Wednesday in December, 1798, the complainant filed in the clerk's office his bill, in which was recited an assignment to him by Sackett of the mortgage from Conkling and Lloyd, which mortgage and assignment

are made exhibits and appear in the record, [pages 194-5-6-7-8]; that S. P. Lloyd had died, and praying a foreclosure of the mortgage. (Rec. 186-7-8.)

At the rules in January, 1799, the case was continued, and at the rules in February, 1799, which, from the preceding orders, appear to have been held on the third Wednesday, and inasmuch as the term of court commenced on the third Monday in February, [see above act], and, therefore, on the third day of the term, the day to which defendant had been warned to appear, "came the complainant, by his attorney, and, on his motion, his bill is taken *pro confesso.*" (Rec 188.)

At the rules held in March, in the year aforesaid, "came complainant, by his attorney, and, on his motion, this case is set for hearing at the next court:"

"At which time, at a court continued and held at Washington district, at the court-house thereof, on the 19th day of June, in the year aforesaid, came the complainant, by his attorney, and all and singular the papers and exhibits being heard, complainant's bill is taken as confessed."

Then follows an interlocutory decree of foreclosure, giving the defendant until the 19th day of the following November in which to pay the mortgage debt. (Rec. 188-9.) This last order appears in the transcript immediately after the order of November 24, 1798, warning the defendant to appear. It is evident, however, that the clerk has made a transposition of these orders, and that the proceedings at rules in December, 1798, and January, February, and March, 1799, should have intervened between the order of November 24, 1798, and the order of June 19, 1799.

At a court held on the 20th of November, 1799, this order was entered: "By consent it is ordered that this suit be continued until the next term" (Rec. 189); at which time a decree of foreclosure was entered and commissioners appointed, who were directed to sell the mortgaged premises at public auction to the highest bidder. (Rec. 189.)

By an act approved December 20, 1802 (*3d Littell's Laws of Ky.*, 37), entitled "*An Act to establish Circuit Courts*," district courts were abolished (Sec. 1), and circuit courts established in their stead; and by Section VII the circuit courts were given general common law and equity jurisdiction. Section XXV directs the transfer to the clerk of the circuit court by the clerk of the district court of all records and papers in his office. Section XXXII provides that—

"Each circuit court shall have the same power, authority, and jurisdiction over suits, matters, and things which may be dependent and undetermined in any quarter session or district court, the papers in which may have been delivered to the clerk of such circuit court, which such quarter session or district court would have had in case this act had never been passed."

Accordingly, in May, 1810 (Record 190), a decree was entered reciting the report of sale previously filed by the commissioners appointed for that purpose by the former decree of the district court, and now finally foreclosing the equity of the defendants in the mortgaged premises.

It appears from these proceedings that the order directing notice to be given to the defendants was made in exact conformity to the requirements of the statute, and that on the day fixed in the order for the defendants to appear the bill was taken for confessed at rules. It also appears that at the ensuing term of the court "all and singular the papers and exhibits being heard, complainant's bill is taken as confessed." (Rec. 189.)

The record is silent as to whether the notice to the defendants was published as directed by the order.

Will it be presumed that the order was not published and and no authority existed for the decree, or will the presumption be that this superior court had before it evidence of the publication and proclamation directed in the order? Every circumstance of the record seems to us to indicate the latter presumption. The first order of warning and publication

against the defendant was entered in June, 1798, citing them to appear at the next term, which was in the following November. No action was taken at the November terms against the defendants, but another order in the same terms was entered directing an alias notice to the defendants to be published and proclaimed.

The act of 1796 prescribed no mode of proving the execution of the order of publication or of the notice at the church and court-house door. These jurisdictional facts were left to be established in such manner as should be satisfactory to the court, and it appears in several early decisions that the usual method was by oral testimony in court that the notice was given as directed by the order.

Thus, in *Jeffries' heirs* vs. *Callis*, 4 *Dana*, 466–7, a case which arose after the act of 1803, authorizing proof of publication by certificate of the printer, the court held that, the proof of publication being the affidavit of the editor and not the certificate of the printer, that the decree was not void, but might be erroneous. Says the opinion:

"Nor for a like reason could a decree be deemed void in judgment of law, because the court may have permitted *oral* testimony, *on oath or otherwise*, by the editor, printer, or *any other creditable person, as proof of publication.*"

In *Green's heirs* vs. *Breckinridge*, 4 *Mon.*, 543, it was said that—

"The affidavit of the editor does prove the publication in the *Gazette*, but that affidavit was not admissible evidence of the fact. A justice of the peace had no authority to administer the oath, *and that power could only be exercised by the court* or some officer authorized by the court to administer it."

In *Bustard* vs. *Gates et ux.*, 4 *Dana*, 430, the opinion, referring to the fact that the record impeached showed no notice to one of the parties, and was as to her "*altogether silent*," observes that the judge may have been satisfied from *other proof not appearing in the record* that the notice was

duly served, and that such must be the presumption after the lapse of 22 years; that, considering the obliterating influences of time, it was safer and more reasonable that such judgment should stand.

When the proof of publication was made orally in court, there was but one way for these jurisdictional facts, as the law then existed, to appear affirmatively in the record, and that was by a recital in the judgment or decree. It was not until more than five years after the institution of this suit, and three years after the entry of the decree of foreclosure, that the law prescribed a certain and definite mode of proving the execution of the order of publication.

By an act to amend the above-recited act of 1796 (directing the method of proceeding against absent defendants, &c.), approved December 22, 1803 (*Morehead and Brown Digest*, 95), it was enacted as follows:

SECTION 1. That so much of the said recited act as required a copy of the order of publication therein mentioned directed to be made against the absentees, shall be posted up at the front door of the court-house, and that a copy shall be published some Sunday, immediately after divine service, at some church or meeting-house door, be, and the same is hereby repealed.

SEC. 2. *Be it further enacted*, That a certificate of the printer in whose paper the said order shall have been published, agreeable to the said act, that it has been so done, together with a copy of said publication, shall be deemed and held to be sufficient evidence of the fact.

It thus appears that the inconvenience of the previously existing system of allowing the proof of such jurisdictional facts to be made orally, and permitting permanent record thereof to depend upon a recital in the judgment, which might or might not happen to be embraced therein, was recognized by the Legislature, which, at the same time that it prescribed a certain mode of proving the publication in the newspaper, repealed the provision requiring the notice to be published at the church and the court-house door.

Unlike the proof of service of summons which, by the sheriff's return, appears in a documentary form in the record, publication of the warning order was, until the passage of this amendatory act, a fact to be determined by proof satisfactory to the court before judgment would be rendered; just as proof would be required of the facts showing the complainant to be entitled to the relief granted. On appeal, such judgment might be reversed for want of satisfactory proof of the fact of publication; but the conclusion seems irresistible that in a collateral proceeding, the judgment being unreversed, the fact of publication must be considered *res adjudicata*, and that sufficient proof was made to the court that the order was published as directed.

VI. *The district court had jurisdiction in rem, independently of special statutory authority.*

It appears from the will of Charles Fleming, and the several conveyances by which the title to the land in controversy passed to the defendants in the foreclosure suit, was situated in Mason County, and therefore within the territorial limits of the Washington District Court. This court, by virtue of the act creating it, was a court of general equity jurisdiction. Its authority, therefore, to fix the status of the mortgaged land, by subjecting it to complainants' demand, was not dependent upon the statute directing the method of providing against absent defendants, but attached by reason of its general powers as a court of equity.

In *Ferrill* vs. *Combs*, 7 *J. J. Mar.*, 247, where the case was reversed because a final decree of foreclosure had been prematurely entered, the Kentucky Court of Appeals said:

"If the last decree had been interlocutory instead of final, there would have been no error, in so far as it applied to the equitable lien; to that extent the chancellor had jurisdiction *in rem*, independently of any statutory authority."

VII. *The foreclosure suit a proceeding in rem.*

It has been repeatedly held by this court, as also by the Kentucky Court of Appeals, that proceedings to subject the property of absent or non-resident defendants, whether by attachment or bills to foreclose, are substantially proceedings *in rem*, respecting which the same presumptions have been indulged as are applied to proceedings strictly *in rem*.

Thus, in *Jackson* vs. *Speed*, 2 *Duv.*, 428, the court, Judge Roberston delivering the opinion, holds that a suit against a non-resident to foreclose a lien for unpaid purchase-money is a proceeding "exclusively *in rem*."

In *Boswell's Lessee* vs. *Otis*, 9 *How.*, 336, where, in an action of ejectment, the title of the plaintiff was derived through a sale under a decree in a suit upon a contract relating to land, the record of which was introduced in evidence by plaintiff, the court said:

"Jurisdiction is acquired in one of two modes: first as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question And it is immaterial whether the proceedings be by attachment or bill in chancery. It must be substantially a proceeding *in rem*."

In *Cooper* vs. *Reynolds*, 10 *Wal*, 308, where, in an action upon a personal demand against an absent defendant, an attachment had been levied on the defendent's property, which was sold under a judgment in the action, and this record was offered in evidence by the purchaser in a suit against him brought to recover the land by the defendant in an attachment suit. The court, through the opinion of Mr. Justice Miller, held:

"But if there is no appearance of the defendant, and no service on him, the case becomes in its essential nature a proceeding *in rem*, the only effect of which is to subject the

property attached to the payment of the demand which the court may find to be due to the plaintiff."

And in *Pennoyer* vs. *Neff*, 5 *Otto*, 724 and 734, after citing the above opinions in *9th Howard* and *10th Wallace*, and observing with approval, as to the latter, that it was essential to the disposition of the case to declare the effect of the action against the absent defendant when his property was sought to be subjected, the opinion (page 734) proceeds:

"It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem*, in the broader sense we have mentioned."

VIII. *Jurisdiction of a superior court, when the record is silent, presumed.*

There is scarcely a limit to the authorities which may be cited in support of the rule, that the jurisdiction of superior courts having jurisdiction over the subject-matter, when their judgments are brought in question collaterally, will, in the silence of the record, be presumed. As to domestic judgments, and to judgments in effect *in rem*, this presumption has been held conclusive. But the question of conclusiveness of such judgments does not enter into this case; the question here being: shall the presumption of jurisdiction prevail, in the *absence of any evidence to the contrary*, either in the record itself or introduced extraneously? Or, in other words, whether, in the silence of the record, the *onus* does not rest

upon the party attacking it to show a *want of jurisdiction* in the court.

In support of the rule above referred to, a few citations from the many cases and other authorities in point are here submitted:

Cooley's Const. Lim., 406:

"It is not to be presumed that a court of general jurisdiction has in any case proceeded to adjudge upon matters over which it has no authority, and its jurisdiction is to be presumed, whether there are recitals in its records to show it or not. * * *

"A record is not commonly supposed to be contradicted by parol evidence. Whenever a fact showing want of jurisdiction in a court of general jurisdiction can be proved without contradicting its recitals, it is allowable to do so, and thus defeat its effect."

In *Foote* vs. *Stephens*, 17 *Wend.*, 483, to an action of debt upon judgment, defendants answer that the jurisdiction of the person of the defendant did not appear from the record; it was held, citing *Peacock* vs. *Bell*, 1 *Saund.*:

"The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior court but that which especially appears to be so. * * * Indeed, it may be asked, where is the case which ever held a judgment record of a court of general jurisdiction void because it omitted to assert some formal steps in the acquiring of jurisdiction? * * * In regard to limited courts, not proceeding according to the course of the common law, it will not presume, and, therefore, they must state by their record. While, as to the superior court, though it omit a formal ingredient, it shall be intended in respect to the solemnity of the main proceedings. *It is unreasonable, and contrary to presumption,* to suppose a judgment recorded in all its important forms *without the usual notice.*"

In *Chemung Canal Bank* vs. *Judson*, 4 *Selden*, 258, to an action of trespass, the defendant pleaded in justification a

decree of a United States district court, directing the act complained of. It was held:

"The power of this court, therefore, to inquire into the jurisdiction of the district court of the United States is undoubted; and the power of that court to inquire into the jurisdiction of this is equally clear.

"The point taken by the plaintiff is founded on the assumption that the authority of the district court to hear and determine must appear on the face of its proceedings. This assumption is erroneous. The authority of inferior courts and magistrates must be shown, while the authority of the higher tribunals of general jurisdiction is presumed until the contrary appears;" citing the rule in *Peacock* vs. *Bell*, also *Yates* vs. *Lansing*, 9 *Johns.*, 407, as follows: "'An inferior court shall, when questioned, show that it acted within its jurisdiction; whereas, in courts of general jurisdiction, jurisdiction is presumed until the contrary appear.'"

1 *Smith's Leading Cases, part* 2, *p.* 1020:

"But whatever the rule may be, when the point arises on a writ of error, which is intended to secure the observance of the due course of law in all material particulars, and, consequently, should not be subjected to any presumption calculated to shut out the truth, there would seem little doubt that the law will aid the proceedings of superior courts when called collaterally in question, by the same favorable intendment, whether they are assailed on the ground of a want of jurisdiction over the cause or over the parties, and will hold their decrees and judgments binding in both cases unless the contrary is apparent."

And on page 1021 of the same authority:

"But the weight of authority is much the other way, and in favor of the position taken in *Foote* vs. *Stevens*, and *Hart* vs. *Seixas*, as, that where a superior court has jurisdiction over the cause, it will be presumed conclusively to have exercised its power properly, and taken the necessary steps to acquire jurisdiction over the party."

2 *American Leading Cases*, 5*th ed.*, 638:

"Superior courts may, however, be presumed to know the limits of these powers, and will be presumed not to have ex-

ceeded them unless the contrary is apparent (*Voorhees* vs. *U. S. Bank*, 10 *Peters*, 472, and *Grignon's Lessees* vs. *Astor*, 2 *How.*, 219); and the better opinion would seem to be that when the subject-matter is within the authority of the court, it will be presumed to have been duly exercised as it regards the parties."

Trimble vs. *Longworth*, 13 *Ohio St.*, 438:

"The distinction between cases where the validity of the record of a court of general jurisdiction is drawn in question collaterally, and those in which such record is directly impeached by writ of error or bill of review is broad and well defined;—in the one case jurisdiction is presumed *prima facie*, unless the record disproves it, while in the other, if it is denied, its existence must be proven by the record itself."

McCahill vs. *Equitable Life Insurance Society*, 26 *N. J.*, 536–7, where a domestic judgment was called in question collaterally:

"And upon the general doctrine that the final judgment of a court of general jurisdiction cannot be called in question in a collateral proceeding, the leading American cases take strong ground.

"The legal rule then is this, that the decision of a domestic court of general jurisdiction, acting within the scope of its powers, has inherent in it such conclusive force that it cannot be challenged collaterally."

The Kentucky authorities are equally strong in support of the rule as to presumptions of jurisdiction.

In the case of *Bustard* vs. *Gates et ux.*, 4 *Dana*, 430, the judgment attacked was a personal one rendered in a summary proceeding by a surety against the heirs of his principal, for whom a debt had been paid. The record showed no notice to have been served on one of the heirs, Mrs. Denny, afterward Gates, the appellee. It was held, p. 438:

"And however doubtful it may be whether the infant heirs had personal notice, as to Mrs. Denny, respecting whom the endorsement is *altogether silent*, we are well satisfied that we

ought not, especially now, and in this collateral proceeding, to decide that there had been no proof of notice in fact to her, when the record says in effect that in the opinion of the circuit judge there was sufficient notice."

Shackleford vs. *Miller*, 9 *Dana*, 277:

The record of proceedings in the court of quarter session, in which a conveyance of land by commissioners was ordered, was introduced in evidence. The court in deciding upon the admissibility of the evidence, say:

"Now although the record of the court of quarter session does not expressly exhibit all the facts which might be deemed necessary to give it jurisdiction, and to show that it had acted regularly and properly; yet as that which does appear and that which may be implied *do not show a want of legal authority to act*, but rather the contrary, we should, especially after so long a lapse of time, presume that the court had legal authority in the case, and that it acted rightly. If the court had jurisdiction, no irregularity in its proceedings could render its acts void or even questionable collaterally in this suit, and we think that after the lapse of forty-three years from the date of the conveyance to the institution of the suit and an apparent acquiescence during the entire interval, the law, as well as reason, policy and justice, will authorize and require the *presumption that every thing was rightly done*, which the record of the proceeding in the court of quarter sessions has *not shown to have been done without authority*.

"We are therefore clearly of the opinion that the conveyance of 1795 should be deemed valid."

Dorsey vs. *Kendall*, 8 *Bush*, 299:

To a suit by Kendall for possession of land in possession of Dorsey the latter pleaded a judgment against Kendall, under which the land was sold and conveyed to Dorsey sixteen years before the institution of the suit for possession. This judgment was attacked by Kendall on the ground that he was proceeded against as a non-resident, when, in fact, he had always been a resident of the State. The court held:

"The proceedings of judicial tribunals having no jurisdiction

over the *subject-matter* are absolutely void; but when the case is within the jurisdiction of the court, and there is error in the proceedings or judgment, the judgment is voidable only and the remedy is by appeal.

"The validity of the judgment rendered in 1852 cannot be questioned in this suit, instituted in 1868. It is the policy of the law to uphold judicial sales and to protect the rights of purchasers under them; and there is no reason why, in the present case, where one of the appellees was actually served with process and the others constructively served, that they should, in such proceeding as this, after the lapse of sixteen years from the service of process, be allowed to show that the warning order was improperly obtained, or that the sheriff had made a false return on the summons."

And in *Davis* vs. *Connelly*, 4 *B. Monroe*, 137, where a foreign judgment was the subject of attack, the court says:

"There is no doubt that in an action brought upon a judgment, the defendant may impeach the validity of the judgment by showing a want of jurisdiction in the tribunal by which it was rendered; but it would seem to be equally clear that the judgments of the superior judicial tribunals of one of these States are, *prima facie*, entitled to the presumption in every other State that they are rendered by competent authority. They cannot, therefore, be impugned by a mere allegation of want of jurisdiction. But he who would defeat a judgment on this ground must *show the want of jurisdiction* by appropriate allegations of fact, unless it appear on the face of the judgment or record, which is the basis of the action."

The case of *Voorhees* vs. *The Bank of the United States*, reported in 10 *Peters*, 468, was an action of ejectment in a Federal court to recover land in Ohio. The defendant produced as evidence of his title the record in a suit against a non-resident, in which an attachment issued by virtue of the judgment in which the land attached was sold. The record failed to show that the affidavit for the attachment required by the statute was filed. The publication of the notice or warning order required by law appeared not to have been made, and the record failed to show that the defendant was called and

made default, which was required as a preliminary step to obtaining judgment. The judgment subjecting the property to the demand sued on was, notwithstanding these defects, held valid. This court, after noticing these defects of the record, proceeds:

"The several courts of common pleas of Ohio, at the time of these proceedings, were courts of general civil jurisdiction, to which was added, by the act of 1805, power to issue writs of attachment, and order a sale of the property attached on certain conditions. No objection, therefore, can be made to their jurisdiction over the case, cause of action, or the property attached. *The process which they adopted is the same as is prescribed by the law; they ordered a sale which was executed, and on the return thereof gave it their confirmation. That was the judgment of a court of competent jurisdiction on all the acts preceding the sale, affirming their validity in the same manner as their judgment had confirmed the existence of a debt.* There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. This rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of the record, which thenceforth proves itself without reference to the evidence on which it has been adjudged."

The opinion dwells at length on the inconvenience and hardship of allowing such records to be collaterally impeached. "Time," (which in that case was less than thirty years,) says the court, "has given an inviolable sanctity to every act of the court preceding the sale, which precludes the defendant from controverting the absolute right of the plaintiff to the full benefit of his judgment."

Cooper vs. *Reynolds*, 10 *Wal.*, 308:

The defendant in an ejectment suit introduced as evidence of his title the record of a suit upon a personal demand commenced against the plaintiff, (sued as an absent defendant,) by

an attachment of his property, in which suit a judgment was rendered and the attached property sold to the defendant in the ejectment suit. The affidavit for the attachment omitted to state the grounds therefor required by law, and the proof of publication of the notice to the absent defendant did not appear in the record.

The court held that, had the defendant appeared, the cause would have been *in personam*, but there being no appearance, and no actual service of process, the case is essentially *in rem*; the only effect of it being to subject the property to such demand as might be adjudged in favor of plaintiff; and that the seizure of the *res*, or that which has the same effect, gave the court jurisdiction; and though the judgment might be erroneous for want of proof of publication, or other defect in the proceedings, it could not be held that the court had not jurisdiction for want of such publication of notice.

The rule as to presumptions in favor of the jurisdiction of superior courts in proceedings in effect *in rem*, is recognized in its fullest extent in the cases just cited. (*Boswell's Lessee* vs. *Otis*; *Voorhees* vs. *U. S. Bank*; *Cooper* vs. *Reynolds*.) And, as said in *Pennoyer* vs. *Neff*, 5 *Otto*, 734, "Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem*."

Against the rule thus repeatedly declared, counsel for the defendants in error will probably cite the following language of this court in *Galpin* vs. *Page*, 18 *Wal.*, 367:

"The presumptions indulged in support of the judgments of superior courts, and also limited to jurisdiction over persons within their territorial limits, and over proceedings which are in accordance with the course of the common law."

And it may be argued that such presumptions will not be applied to proceedings to subject the property of non-residents commenced by statutory orders of warning and publication.

An examination of the reasoning upon which this opinion is based will, I apprehend, show that the whole of the proposition quoted referred to proceedings upon personal demands, or in which the defendant was sought to be held personally bound.

The proceedings in the consolidated cases in the State court, whose judgment was here impeached, appear to have been personal in their nature, and were so treated throughout the opinion.

These actions were instituted to settle two alleged partnerships, one of the defendants, the heir of the alleged partner, being a non-resident of the State. In one case, it appeared that the affidavit required by the statute had not been filed prior to the entry of the order of publication and warning; in the other, it appeared that no warning order whatever had been made by the court. It further appeared that the judgment in these cases had been reversed by the appellate court of the State on the ground that no sufficient publication was made. A sale under this decree to the complainant's attorney, made pending the appeal, was after the reversal relied on in support of the title of the defendant Page. The record thus disclosed, affirmatively, a failure to acquire jurisdiction over the person of the defendant, and a reversal by the appellate court upon this ground. The opinion fully recognizes the general doctrine concerning presumptions in favor of the jurisdiction of superior courts, but shows that, where the record discloses affirmatively the evidence of alleged jurisdictional facts, insufficient to warrant the decree, it will not be presumed that there was evidence of other and different facts, or that the fact was otherwise than as stated.

As said in the opinion of the court by Mr. Justice Field, page 365:

"The record of itself establishes the invalidity of the decree. The adjudication of the appellate court states the law of that case upon the points adjudged, and is binding upon the circuit court and every other court when brought before it for consideration. * * *

"It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgment it renders until the contrary appears. And this presumption embraces jurisdiction, not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The first will generally appear from the character of the judgment, and will be determined by the law creating the court or prescribing its general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant or his appearance in the action. But when the former" (jurisdiction over the subject-matter) "exists, the latter" (jurisdiction of the parties) "will be presumed. This is familiar law, and is asserted by all the adjudged cases. * * *

"But the presumptions which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts, concerning which the record is silent Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. * * * When, therefore, the record states the evidence, or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred."

Then follows the observation of the court that the presumption in favor of jurisdiction is limited to "proceedings in accordance with the course of the common law." That the rule thus declared was intended to apply to proceedings *in personam*, and not to those in effect *in rem*, is indicated by the following language of this opinion and the accompanying citations:

"Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant against whom a *personal* judgment or decree is rendered was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption

of jurisdiction over *his person* ceases and the burden of establishing jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. (P. 368.) * * * When, therefore, by legislation of a State constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against *the person* of an absent party, not a citizen of the State, nor found within it, every principle of practice exacts a strict and literal compliance with the statutory provision."

And quoting from *Ricketson* vs. *Richardson*, 26 *Cal.*, 149, referring to the statute authorizing service by publication:

"These sections are in derogation of the common law, and must be strictly pursued in order to give the court jurisdiction over the *person* of the defendant." (P. 369.)

And again (p. 370) citing *McMinn* vs. *Wheeler*, 27 *Cal.*, 300:

"It was objected, that the publication thus made was insufficient to give the court jurisdiction of *the person* of the absent defendant. The objection was answered by the position that the judgment could not be questioned collaterally, for the reason that the jurisdiction of a court of general or superior jurisdiction would be presumed in the absence of evidence on the face of the record to the contrary, but the court held the objection well taken, and after referring to the case of Peacock *vs.* Bell, in Saunders, said that that case involved the question of jurisdiction as to the *subject-matter of the action*, and not as to *the person* of the defendant when the same is to be acquired by a special statutory mode without personal service of process. If jurisdiction of the *person* of the defendants is to be acquired by publication of the summons, the mode prescribed must be strictly pursued."

The citation p. 371 from the New Hampshire case, Morse *vs.* Presley, 5 Foster, to the effect that where special and summary powers are exercised wholly derived from statutes, and not according to course of the common law, no such presumption exists, referred to bankruptcy proceedings, where the powers of the court incident thereto do not belong to a federal court by virtue of its general authority as a su-

perior court. The court then speaks of proceedings by "seizure or attachment of the property where a judgment *in rem* is sought," as being according to the course of the common law, and declares that, "the same presumption of jurisdiction will attend the judgments of the court" in such cases, as in cases falling within its general powers. And as shown by *Boswell, lessee,* vs. *Otis,* 9 *How.,* and *Pennoyer* vs. *Neff,* 5 *Otto,* 754, bills to foreclose a mortgage or enforce a lien are to be considered upon the same footing with proceedings by seizure or attachment, substantially proceedings *in rem.*

The opinion in *Galpin* vs. *Page* is therefore not opposed to the presumption, which it is submitted should be exercised in favor of the judgment in the foreclosure suit of Clark *vs.* Conkling, offered in evidence, but is really an authority in its support.

Another important difference between the case of Galpin *vs.* Page and that here presented is that the California statute prescribed the mode of proving the publication, while the Kentucky statute did not. The opinion in *Galpin* vs. *Page,* referring to the absence of the defendant from the State of California, proceeds:

"The record in the two actions, and, of course, in the consolidated action, shows that she was thus beyond the reach of the process of the court All presumption of jurisdiction over her *person* by the district court, which otherwise might have been indulged, is thus repelled, and it remains for the defendant to show that by the means provided by statute such jurisdiction was competent. The statute provides, in the case of absent and non-resident defendants, for constructive service of process by publication. It requires an order of the court or judge before such publication can be made. It designates the facts which must exist to authorize the order; the manner in which such facts must be made to appear, and the period for which publication must be had, and the *mode in which the publication must be established.* These provisions as already stated must be strictly pursued, for the statute is in derogation of the common law."

In Clark *vs.* Conkling all the provisions of the statute are complied with, as shown by the record. The order of the court directing publication was duly made. The facts authorizing the order appear in the record in the manner prescribed, and the publication ordered was for the period prescribed by the statute. The law then in force, however, did not prescribe the mode in which publication must be established, and, as before suggested, the proof was left to the discretion of the court.

In *Pennoyer* vs. *Neff*, 5 *Otto*, 714, the record was objected to because: (1.) The judgment was *in personam* against a non-resident, without appearance or personal service of process. (2.) The judgment was not *in rem*, and therefore constituted no basis of title in Pennoyer. (3.) Jurisdiction is not shown to give the judgment either *in rem* or *in personam*. The court, reviewing many authorities—among them *Cooper* vs. *Reynolds*, *Webster* vs. *Reed*, (reported in 11 How.,) and *Dorsey* vs. *Ketcham*—shows that in proceedings against non-residents a different rule is applicable in testing the validity of judgments when *in rem* and *in personam*, and holds that such judgments are—

"Without any binding force except as to property or interests in property within the State, to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under the control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained and the party does not appear, as effectual and binding merely as a proceeding *in rem*, and having no operation beyond the disposition of the property or some interest therein." (Page 730.)

This, of course, is the only effect of the decree of the Kentucky court offered in evidence, and no force is claimed for it other than as it disposes of the property proceeded against.

A number of Kentucky cases may, perhaps, be cited by counsel for defendants in error, to the effect that judgments against non-residents, rendered without the publication required by the statute, were inoperative and void; but in every case where such judgments were declared void, when collaterally attacked, the failure to publish the notice as required by law appeared affirmatively in the record, when, of course, there was no room for presumption. In one or two of these cases there were *dicta* to the effect that unless compliance with the statutory requirement as to publication appeared in the record such judgments were void; but these observations of the court were not decisive of the questions involved, the real question being whether the judgments were void when the record disclosed affirmatively that the statutory requirement as to publication was not complied with. But if these cases could be considered authoritative in that respect, they were expressly overruled in *Newcomb* vs. *Newcomb*, 13 *Bush.*, 544, which will be hereafter referred to.

Thus, in *Green's heirs* vs. *Breckinridge*, 4 *Mon.*, 543, the interlocutory order directing the publication at the courthouse door, etc., expressly recited that the notice had not been published at these places as directed, and the alias order of publication, upon which the decree was rendered, warned the defendant to appear on a day already passed. The decree was held void.

So in *Blight's heirs* vs. *Banks*, 6 *Mon.*, 205, the record attacked showed on its face that the publication was not made for the length of time required by law. For this, and another, perhaps, stronger reason, the judgment was held void.

In *Berryman* vs. *Mullins*, 8 *Mon.*, 154, the order of publication was defective, the publication being directed to be made for a shorter time than that required by law.

In the case of *Green's heirs* vs. *McKinley*, 6 *J. J. Marsh.*, 197, the order of warning directed a publication for a shorter period than that required by law, and there was no proof as required that this was published, and the decree was held

void. It will be noticed that this case arose after the passage of the act directing proof of publication by certificate of the printers, and differing, therefore, in this regard from the case of Clark *vs.* Conkling.

In *Lawlins* vs. *Lackey*, 6 *Mon.*, 70, the proof of publication appearing in the record showed affirmatively that it had not been made for the period directed by the order.

The case of *Brownfield* vs. *Dyer*, 7 *Bush*, 507, was a case under the code, when warning orders without publication had been substituted as a mode of constructive process. The record showed on its face that the warning order had not been made as provided by the code, only eighteen days being given the defendants within which to appear, while the code required sixty days. The dictum of the court, that "the record must show on its face that the provisions of the code were substantially complied with, or the judgment must be treated as void and inoperative;" citing *Green* vs. *Breckinridge*, 4 *Mon.*, and *Blight* vs. *Banks*, 6 *Mon.*, is not sustained by these decisions, and is expressly denied by the opinion in *Newcomb* vs. *Newcomb*, 13 *Bush*.

In *Long* vs. *Montgomery*, process returned executed, but without the sheriff's signature, and judgment by default, reciting that defendant was served, on direct appeal the judgment was reversed as void and erroneous, notwithstanding the recital. It was unnecessary on appeal to declare the judgment void, and as was said in the *Newcomb* case, would not have been so held had it been questioned collaterally.

In the case of *Newcomb's exr's* vs. *Newcomb*, 13 *Bush*, 544, a decree of divorce against a non-resident defendant was the subject of attack, the record failing to show that the affidavit required by the code as a preliminary to obtaining the warning order had ever been filed, and it was contended that therefore the warning order was unauthorized and the decree consequently void. Probably no case in the Kentucky court of appeals was ever more exhaustively argued or more

thoroughly considered, the arguments of Mr. Justice Harlan, then of counsel, and of Mr. John Mason Brown, the syllabi of which are reported with the opinion, furnishing an almost complete digest of the law of presumptions respecting jurisdiction.

The decision in this case will, I apprehend, have especial weight as being the most recent exposition by the highest court in Kentucky, of the law upon a question similar to that here presented.

After referring to the rule that presumptions are to be exercised favorable to the jurisdiction of superior courts, and to the distinction in Galpin *vs.* Page as to presumptions in favor of judgments against persons within and cases against those outside of the territorial limits of the court's jurisdiction, the opinion of the Court of Appeals in the *Newcomb* case proceeds:

"After a careful consideration of that case and the authority, as well as the reasoning upon which it is based, we cannot recognize the distinction." And, quoting from *Coit* vs. *Haven*, 30 *Conn.*: "'It is necessary that confidence should be reposed in courts of a high character, as well as in the records of such courts.'

"It is the only safe rule to give the decisions of courts of general jurisdictions full effect so long as they remain in force, rather than leave them open to be attacked in every way and on all occasions. This mode of reasoning is found in nearly all the cases on the subject, and the doctrine fully recognized in the case of *Galpin* vs. *Page*, when applied to domestic judgments, or rather to judgments against parties within the territorial jurisdiction of the court. If the rule is established by reason of the public good, and to maintain confidence in the administration of justice by courts of general jurisdiction, why should it not apply to the non-resident as well as the resident? It is not denied that civil proceedings may be had by constructive service affecting the personal and property rights of a non-resident, and there is the same necessity for protecting the property interests acquired under such a judgment that there is when all the parties reside within the State in which the judgment is rendered. * * *

"In the case of *Brownfield* vs. *Dyer* (*reported in* 7 *Bush*), it appeared from the record that the order of warning made was not authorized by the code. It was, in fact, no warning, as was clearly shown upon inspection of the record itself; the record disclosing a want of jurisdiction, it was held that the judgment was void. In the case of *Green's heirs* vs. *Breckinridge* (4 *Mon.*), and *Blight's heirs* vs. *Banks* (6 *Mon.*), the record *discloses a want of jurisdiction*, and no presumption will be indulged contrary to the facts the record itself develops. * * * In the case of *Long* vs. *Montgomery* (6*th Bush*), it appeared from the record that the sheriff's return was indorsed *executed*, without any signature, and although the judgment recited that the party appeared, this court held, no doubt from the execution of the officer's return, that the recital was merely formal, and determined the judgment void. In the absence of any summons in the record, with such a recital as that the party appeared, or was duly served, and a judgment, such a judgment would not be determined void in a collateral proceeding, and, if considered as error, can be remedied only by an appeal."

The opinion cites at some length the case of *Hahn* vs. *Kelly*, 34 *Cal.*, 391, the citation ending thus:

"'There is no force in the suggestion that the court is exercising a general power when obtaining jurisdiction by actual service, and a limited or special power when doing so by constructive service. The distinction is not as to the power, for the power is the same in both cases, but as to the mode of exercising it.' The reason for indulging a presumption in the one case applies with like force to the other."

"The proceedings of the courts of this State are not conducted according to the course of the common law, but regulated by the code of practice and in regard to judgments of courts of general jurisdiction within the State, the same presumption must be indulged in, whether the judgment or proceedings follow the common law or are regulated by statute, unless the statute prescribes a different rule for determining the validity of the judgment."

The subject of the proceeding reviewed in the *Newcomb* case was a *status*, yet it was a *personal status*, and the person affected by the judgment impeached was an absent defendant without the limits of the court's jurisdiction. Yet the Court of Appeals held that the most favorable presumptions as to jurisdiction were to be applied to these proceedings; and pronounced the remarks of that court in *Green* vs. *Breckinridge* and *Long* vs. *Montgomery* as to the judgment being void unless the facts showing jurisdiction appear in the record, unnecessary *dicta*, and inapplicable to the cases in which they were made, thus emphasizing what obviously appears from the cases themselves. The opinion also holds that such is not the law when such judgments are collaterally attacked.

When, as in this case, the subject matter is the *status* of *property*, the rule as to presumption in favor of the judgment and of the court's jurisdiction would seem to be beyond question.

IX. *The onus of proving want of jurisdiction upon the party attacking the judgment.*

In *Thompson* vs. *Williams* the question was as to the conclusiveness of the record as to the jurisdictional facts recited. In that case the question was whether the subject matter, a sloop, was within the jurisdiction of the court, and it was held that in a collateral proceeding by the owner against the sheriff, the jurisdictional facts might be contradicted. The opinion, by Mr. Justice Bradley, reviews many cases, and while holding that even recitals of the record may be *contradicted*, does not intimate that in the absence of contradictory evidence, either in the record or out of it, jurisdiction would not be presumed. Referring to the case of *Landes* vs. *Brandt*, 10 *How.*, 348, in which a defendant unsuccessfully attacked a judgment which recited, "Now at this day come the parties aforesaid by their attorneys," by showing that he was not served with process and was absent from the country, the

opinion, 18 Wal., 464, continues: "Here it is evident the proof *failed to show want of jurisdiction*. The party assailing the record *should have shown* that the counsel who appeared were not employed by the defendant."

The case of *Webster* vs. *Reid*, 11 *How.*, 437, also cited in 18 *Wal.* (p. 466), was reversed because the defendants were *not permitted "to prove that no notice was given and that none was published."* Similar questions arose in other cases cited in *Thompson* vs. *Williams*.

Had the defendants in the case now before this court offered, and been denied the right, to prove that the order of publication was not made or published, the case in 18th Wallace would have been an authority in their favor.

X. *The presumption of publication corroborated by proof.*

Although the burden was upon the defendants to show that the publication was not made, the plaintiffs spared no effort to establish the fact and corroborate the presumption as far as possible by positive proof. For this purpose the original files of the Kentucky *Gazette* of 1798–99 were produced, showing nine separate successive publications of the notice (R. 199). This mode of proof, as we have seen, 4 *Dana*, 466, was competent in the original case, and was clearly admissible in support of the record, though perhaps unnecessary.

The positive proof thus furnished, that the direction of the order most inconvenient of execution—the publication in a distant newspaper—was strictly complied with, supports and strengthens the presumption that the convenient and inexpensive notice at the church and court-house door was given as ordered.

If it should be urged that, even admitting the judgment of Clark *vs.* Conkling in evidence, the plaintiffs have not proven independently a conveyance from Sackett to their ancestor Clark, it may be answered, that the record of the judgment with the exhibits contained was itself evidence of the conveyance, and it would have been idle to offer evidence of such conveyance, which might have required the evidence of this excluded transcript to support it.

Besides, as was held in *Sidwell* vs. *Worthington*, 8 *Dana*, 75, where a judgment record and a deed were both essential links in a chain of title, the court having erroneously excluded the record, it would have been futile and was unnecessary to offer independent evidence of the conveyance.

In the preparation of this argument I have had no conference with counsel, nor have I, prior to the filing of my brief, examined or seen any other brief in the case, and while I may not anticipate the argument of counsel for the defendants, it is believed that the foregoing will be found a fair review of the law and facts of the case.

It is respectfully and confidently submitted that the judgment of the Circuit Court should be reversed.

N. T. CRUTCHFIELD,
Counsel for Plaintiffs in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

Kate Applegate and Others
Plaintiffs,

No. 414. *v.*

The Lexington and Carter County Mining Co. and Others,
Defendants.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

ARGUMENT FOR DEFENDANTS IN ERROR.

ED. F. DULIN, and
JOHN F. HAGER,
Attorneys for Defendants in Error.

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STATEMENT OF CASE.

This is a writ of error, prosecuted by the plaintiffs, who were also plaintiffs below, from a judgment of the Circuit Court of the United States for the District of Kentucky, held at Covington.

An action was therein brought by the plaintiffs in error against the defendants to recover 8,334 acres of land in Greenup, Boyd, and Carter counties, in Kentucky, a part of a tract of 18,000 acres granted to Charles Fleming by the Commonwealth of Virginia, by letters patent, dated April

21, 1792, of which the plaintiffs claimed to be owners, and they prayed judgment for said land and for $100,000 in damages for its detention, under paragraph 2 of their petition (Record, pp. 6, 7).

Subsequently (April term, 1879), on the plaintiffs' motion, the second paragraph of their petition was dismissed without prejudice (p. 40).

The plaintiffs filed amended petition, correcting mistakes in petition as to the proper individual and corporate names of the defendants. (See same and order in reference to answers thereto, pp. 24, 25.)

All the defendants answered, and denied the right of plaintiffs to recover the land or damages claimed.

Answers and defenses at pp. 11–20, 22, 23; amended answers, pp. 25, 26, of Record.

Replies to these are at pp. 27 to 31, inclusive, and amended replies at pp. 32 to 37. By consent of parties the court ordered said replies "considered as traversed of record" (p. 32).

All the pleadings of the parties were under the Civil Code of Practice of Kentucky, and the issue joined was simply whether the plaintiffs had title to and owned the land in contest, and were, in said action, entitled to recover the same against the defendants.

At August special term, 1880, upon a trial of the case, pursuant to instructions and charges from the presiding judge, the jury returned a verdict for the defendants, and the court thereupon rendered judgment in accordance therewith (p. 44).

The court overruled the motion of plaintiffs for a new trial. (See order, and order, also, in reference to bill of exceptions, pp. 44, 45).

Because of, and to reverse the judgment and action of

the court aforesaid, the plaintiffs are now here prosecuting their writ of error.

The record does not disclose the grounds or reasons the plaintiffs had or gave the court upon their motion for a new trial. They claim to be the heirs-at-law of Cary L. Clark, deceased, and that as such they inherited the land in contest, that their said ancestors derived title thereto by a regular and unbroken chain from Charles Fleming, the patentee thereof, from the Commonwealth of Virginia. They exhibited alleged title papers to connect themselves with the Fleming title, some of which the court permitted to be read as evidence before the jury, but rejected others necessary to the continuity of the plaintiffs' alleged title, and thus resulted the nonsuit sustained by them.

We believe and will urge that the action of the court was proper, and should be affirmed.

We shall adopt for comment and argument upon the title papers offered by the plaintiffs the order of their presentation, and in this order:

1. Patent to Charles Fleming by the Commonwealth of Virginia, dated April 21, 1792, for 18,000 acres of land, which was read in evidence without objection (p. 45).

2. The will of Charles Fleming, devising to Wm. Fleming, John Bernard, Jr., and Richard Bernard, as trustees, his lands, including the tract of 18,000 acres aforesaid, which will was permitted to be read to the jury as evidence, against the objection of defendants, not now, however, insisted upon.

As thus admitted by the court, the plaintiffs had only so far progressed with their showing of title as to vest same in Wm. Fleming and others, trustees (pp. 46, 47).

Then, without showing title out of the devisees and trustees of Fleming, or that same was in Sackett, or Conk-

ling, and Lloyd, the plaintiffs, against the objections of defendants, were permitted to read in evidence:

Copy of a deed from Sam'l Sackett and wife to Joseph Conkling and Sam'l P. Lloyd (pp. 50–52), and also:

Copy of a mortgage from Joseph Conkling and Sam'l Lloyd, grantees aforesaid, to their grantor, Sam'l Sackett, deed and mortgage dated 29th August, 1795 (pp. 54, 56).

The plaintiffs then offered a paper, purporting to be a copy of a deed from Wm. Fleming and others, trustees, under the will of Charles Fleming, to John and Wm. Bryan, dated December 31, 1796 (pp. 58–60).

Also:

A copy of a paper, called a deed or power of attorney, from John Bryan to Sam'l Sackett, dated 28th January, 1797 (pp. 61, 62).

The court, upon the objections of defendants to the offer of plaintiffs to read same in evidence, rightfully, as we believe, rejected them.

I.

Copy of deed is admissible as evidence only when acknowledgment or proof thereof was legally sufficient to entitle it to record.

Robert Mitchell, as mayor of Richmond, Va., certifies that the deed of Fleming et al., trustees, to John and Wm. Bryan, was acknowledged before him 2d January, 1797 (certificate, p. 61). The other paper, of date 28th January, 1797, was not acknowledged before an officer authorized to take such acknowledgment. A memorandum appears thereon, telling us that it was sealed and delivered in the presence of Ab'm Laurance, who signs his name thereto. Who Ab'm Laurance was, or what his official character, does not appear; the only presumption we are allowed to indulge is, that he was but an unofficial person, and without author-

ity to receive or certify acknowledgments of such instruments.

It was upon such authentication, or attempted authentication, that Achilles Sneed, then clerk of the Kentucky Court of Appeals, admitted these papers to record in his office 8th June, 1816—nineteen years after their execution; and it is from this record and office they were certified for evidence upon this trial, by copy. Were it conceded that originally these papers were properly authenticated so as to authorize the clerk to admit them to record, yet, presented as they were, nearly twenty years after execution, the clerk was then without authority to admit them to record.

To prove title by deed, plaintiffs must show a deed which satisfies the requirements of the law of the state where the land lies. (Abbott's Trial Evidence, 693.) A certified copy of the record, duly certified by the recording officer, is equally competent as the original instrument, provided the acknowledgment or proof was sufficient to entitle it to record; otherwise not (*Carpenter* v. *Dexter*, 8 Wall. Sup. Ct. Rep. 513).

The statutes regulating conveyances, and in force when these alleged conveyances were made, are contained in Vol. I. Morehead and Brown's Statute Laws of Kentucky.

They were:

1. An act of the General Assembly of the Commonwealth of Virginia, in 1785 (pp. 432 to 434).

2. The act of 1792, regulating relinquishments of dower and recording letters of attorney (p. 434).

3. An act approved December 19, 1796, and in force from 1st January, 1797.

The act of 1782, establishing a District Court on the west-

ern waters, contained the following provision: "The said court may admit deeds to record *within the time limited by law*, either upon proof, or acknowledgment thereof before such court."

The act of 1785, last cited, required a conveyance to be "acknowledged by the party or parties who shall have sealed and delivered it, or proved by three witnesses to be his, her, or their act, before the general court, or before the court of that county, city, or corporation, in which the land conveyed or some part thereof lieth," within *eight months* after the time of sealing and delivering, and to be lodged with the clerk of such court to be recorded.

It was further therein provided, "that if the party who shall sign and seal any such writing, reside not in Virginia (Kentucky), the acknowledgment and proof thereof should be made before any court of law, mayor, or other chief magistrate of a city, town, or corporation in which the party shall dwell, certified in the manner such acts are usually authenticated by them, and offered to the proper court to be recorded within *eighteen months* after the sealing and delivering, should be as effectual as if it had been made in the last mentioned court."

By an act approved December 21, 1795, and in force from 1st March, 1796, it was provided that deeds, powers of attorney, and other writings, might be admitted to record in the clerk's office of the Court of Appeals, the clerk taking the acknowledgment or proof, in the same manner as if done in open court. Vol. I. M. & B. Statutes of Ky., p. 437.

The act of 1796, last cited, changed the act of 1785, affecting our present consideration on two points only, viz: Where the former act required acknowledgment or proof before the court, the act of '96 provided that same might be in the office of such courts; and as to acknowledgment and

proof the deeds of non-residents, required an offer to the proper court for record within *eight* instead of *eighteen* months.

Construing these statutes, the Kentucky Court of Appeals, as early as the year 1821, in the case of *Womack & Wilson* v. *Hughes*, reported in Littell's Selected Cases, 292, in which the title now relied on by plaintiffs was drawn in question, says: "The common-law principle relative to enrolled deeds has been uniformly applied by this court to deeds recorded according to our statutes. It is not, however, every placing a deed upon record which makes it a recorded deed. The statutes usually point out the officer or court before whom the deed is to be acknowledged, of what the acknowledgment shall consist, and how and to whom it shall be certified; and they are equally positive as to the time in which the different acts shall be done. Within these periods, the recording officers have authority to record the instrument; afterward, such authority ceases, and by no fair construction of the act in question can the requisite of time be dispensed with."

"After the eight months from the recording in Woodford had elapsed, there existed no authority in the court of Mason to record this deed, and it must stand as a deed not recorded at all." The concluding portion of the opinion of the court is upon the deed of Fleming's trustees to John Bryan of 31st December, 1796, in which it is said that said deed was "recorded at an hour when there was no authority of law to do so, and it ought not to have been admitted in evidence."

To authorize the copy of a deed to be used in evidence, the original must be recorded in such a manner as to be valid against creditors and purchasers. (*Morgan* v. *Beall*, 1 Mar. 310.) An official copy of a deed, not recorded in time, can not be used in evidence.

Edwards v. *Hannah*, 5 J. J. Marsh. 117.

Winlock v. *Hardy*, 4 Litt. 272.
Taylor v. *Bush*, 5 T. B. Mon. 87.
Harris v. *Price*, 14 B. Mon. 333.

In Kentucky, as in most of the states, deeds and other instruments affecting the title to real property can only be recorded after they have been acknowledged or proved before certain designated officers, and the certificate of such acknowledgment or proof attached. An inscription upon the books of record of an instrument, without such authentication, is considered a mere unofficial entry of the clerk or register, constituting no record, and imparting no validity.

Carpenter v. *Dexter*, 8 Wall. Sup. Ct. 532.
Carter v. *Champion*, 8 Conn. 555.
De Witt v. *Moulton*, 17 Maine, 418.
Gilman v. *Cowand*, 12 Smedes & Marshall, 262.
Kerns v. *Swope*, 2 Watts, 75.
Miller's Lessee v. *Holt*, 1 Tenn. 111.

The certificate of the mayor of Richmond to deed of Fleming et al. to Bryan, is open to the further objection, that he does not certify an acknowledgment by Charles Marshall, who is principal in the conveyance, but, simply, that it was acknowledged by "William Marshall, attorney, in fact, for Charles Marshall;" and naming him as an attorney in fact, in the certificate, can not be considered more than a description of person, in a court of law.

Nor is the deed good as to Charles Marshall's title, because no power of attorney is exhibited, appointing the said William Marshall attorney, and authorizing him to make such conveyance. (§ 2, Act 1702, Vol. I. M. & B. Statutes.)

In consideration of all this, manifestly, the court could not do otherwise than reject these papers as evidence to show title out of Fleming's trustees.

The act of 1831 (Vol. I. M. & B. Statutes, p. 453) can be of no avail to plaintiffs in avoiding the force and fatality of the objections urged against these papers; for this statute only applies, where the proof of acknowledgment and certificate conformed to the requirments of the law in force, when these acts were performed.

II.

Mere antiquity of a deed is not sufficient to entitle it to be read as evidence; nor can the record of a suit, against one not a party, be received as corroborating proof of its execution.

The plaintiffs offered in evidence a deed purporting to be the original of the deed from Fleming's trustees to Bryan, and in support of the competency of said deed as an original paper, produced the papers in the suit of *Hughes* v. *Shore's Heirs*, filed in the Greenup Circuit Court (Kentucky), July 15, 1815 (Record, p. 63, deed at p. 100); also in further support of their said deed offered to show possession by one James Howe upon portions of 18,000 acres, granted to Chas. Fleming, and deeds and settlements under him; and to show by parol testimony, that said deed was recorded in the clerk's office of the Kentucky Court of Appeals (Record, 170). The court sustained the objections of defendants to the introduction of this evidence, and to the reading of said paper, claimed by plaintiffs to be the original deed.

The record in *Hughes* v. *Shore's Heirs* (pp. 63 to 150) can, in no aspect of this controversey, be properly considered as evidence between these parties. The land here in contest is 8,334 acres, the south end of the Fleming 18,000 acre grant, as this record fully discloses. The contest between Hughes and Shore's heirs, as is shown by the bill in chancery of complainant, James Hughes (p. 90), and is for another tract of 16,191 acres. No part of the 18,000 acres of Fleming was the subject-matter of controversey between them, or in any

manner connected with it. It is not pretended by the plaintiffs here, that these defendants or any of them, or their privies, were parties to the suit of *Hughes* v. *Shore's Heirs*.

Conforming to established law, that the record of a suit, and any fact appearing therein, is not evidence against one not a party thereto, the court properly rejected this record.

Davis v. *Wood*, 1 Wheaton, 6.
Tappan v. *Beardsley*, 10 Wall. 433.
Owings v. *Hull*, 9 Peters. 624.

Kentucky authorities to the same effect, are:

Fenwick v. *Macy*, 2 B. Mon. 471.
Beckwith v. *Merryman*, 2 Dana, 373.
Samuels v. *Hall*, 9 B. Mon. 370.

But further, and very pertinently, it appears in the record (p. 148) that the chancellor decided against Hughes, the complainant, because the certificate and seal of mayor on deed of Fleming's trustees to John Bryan, was not sufficient to authorize it to be read, and because the same could not be read as a recorded deed, not having been recorded in the time prescribed by law; and because, by rejecting this deed the complainant's chain of title was broken, a decree was rendered dismissing his bill with costs. This decree was rendered July, 1825, was final in its nature, and from aught appearing in the record, was never disturbed or sought to be reversed. Thus do we yet find this deed doubly condemned by the Court of Appeals in *Womack & Wilson* v. *Hughes*, and by the chancellor in *Hughes* v. *Shore's Heirs*.

Should the concession be made that the record of *Hughes* v. *Shore's Heirs* might be read as evidence for the plaintiffs, what would be its benefit to them? Their offer of the record was in support of the competency of the deed of Fleming et al. to Bry-

an, as an original paper. It does not appear in the record, in the pleadings of the parties, or by any order or decree of court as an original paper. It is true that in a list of papers filed by James Hughes, complainant, and found on pp. 149, 150, it is stated that with other papers was found an original deed from Fleming, etc., trustee, to John Bryan. This list is nowhere referred to or made part of the record by an order of court, and is but a private memorandum of Hughes; and therefore not to be considered a part of the record.

The mere fact that a paper was found on file amongst the papers of a cause is not evidence that it is a part of the record.

Sargeant v. *State Bank of Indiana*, 12 Howard, U. S. 371.

Lewis v. *Robards & Co.*, 3 Monroe, 410.

The offer of plaintiffs in support of competency of the deed, as an original paper, to show possession by James Howe and deeds and settlements under him was incompetent and irrelevant, because, as hereafter appears, the title and claim of Howe was not in the least connected with the alleged title of plaintiffs.

None of the papers offered as copies (pp. 170 to 184) conduced to prove the claim of plaintiffs that the paper offered was the original deed of Fleming's trustees to Bryan. There is no proof that it was an original deed; the bill of exceptions says, only, the plaintiffs *claimed* it to be the original. No attempt was made to prove the hand-writing or the genuineness of the signatures of Fleming, Bernards, Bryan or the officers before whom it was alleged to have been acknowledged, or to account for the failure of their attempt to do so. It is manifest that the paper offered was a copy, and to support it by remote inference, an attempt is made to prove

by witnesses that copies of such an instrument were of record in certain recording offices of the commonwealth. Attention is called to the fact that there is no proof that Bryan or Clark, or the plaintiffs, ever had possession or claim under the deed; therefore plaintiffs were not entitled to an admission of such alleged deed in evidence without direct proof of its execution.

An ancient deed may be admitted in evidence without direct proof of execution, when shown to have come from proper custody, and appearing to be of the age of at least thirty years, if either a corresponding possession under it for at least thirty years is shown, or if such account of it be given as may reasonably be expected under all the circumstances of the case, and affords a presumption that it is genuine.

Abbott's Trial Evidence, p. 708.
Crowder v. *Hopkins*, 10 Paige, 183.
Stanning v. *Bowen*, 6 Barb. 109.
Jackson v. *Blanshan*, 3 Johns. 292.

There must always be possession or other corroborating proofs.

Wilson v. *Betts*, 4 Denio, 201.
Clark v. *Owens*, 18 N. Y. 434.
Ridgley v. *Johnson*, 11 Barb. 527.

Passing now from the further consideration of the unsuccessful efforts of the plaintiffs to show title out of the devisees and trustees of Charles Fleming, we will consider in their order the further presentation of the title papers made by them.

The next paper in the deed of John Bryan and wife to Samuel Sackett, dated January 28, 1797 (p. 174), which was offered to be proved by copy from the clerk's office of the

Kentucky Court of Appeals, which, being rejected by the court, the plaintiffs then offered in evidence a paper claimed by them to be original of the deed last mentioned, and in support of its competency offered the same evidence offered in support of the deed of Fleming, etc., trustees, to John Bryan (p. 177), and the court ruled as before in excluding it. The plaintiffs further offered in evidence a paper claimed by them to be the original of a deed from Charles Fleming to John and Wm. Bryan, dated August 8, 1794, upon which offer the same evidence as upon the two last mentioned deeds was offered; and further, they produced the clerk of the Mason County Court and deed book of Mason county, containing records of 1794, to show that a deed identical in terms with said paper was therein recorded. To all which the court sustained the objections of defendants and refused to permit said paper in evidence.

The argument heretofore made on the deed of Fleming's trustees to Bryan as an original paper is alike applicable to these.

The deed of Bryan and wife to Sackett purports an acknowledgment April 3, 1797, before two justices of the peace for Somerset county, New Jersey. Frederick Frelinghuysen, county clerk, certifies that the justices subscribing the certificate of acknowledgment "are justices of the peace in and for the county of Somerset." As to the act of acknowledgment made by the parties it is certified, only, that they "acknowledged in our presence that they executed the same for the uses and purposes therein mentioned." This paper was admitted to record by the clerk of the Court of Appeals, July 7, 1816.

The act of 1796, regulating conveyance provides, "that when any person is about to convey a tract of land, and resides in any other county than that in which the land doth

lie, it shall and may be lawful for such person and his wife (if he has any) to acknowledge and *subscribe* a deed for the same, in the presence of two justices of the peace in the county where they reside, and such justices, having previously examined the wife apart from her husband, whether she with her own free will and consent relinquishes her right of dower in such lands, shall *certify* the same on the deed, under their hands, and a copy of such deed shall be recorded in the court of the county within four months, and the clerk shall certify on the original deed, that a true copy thereof hath been recorded in his office; and such deed shall, eight months thereafter, be recorded in the court of the county in which the land shall lie." The next section provides, "that where the parties reside in any other state, and are about to convey land lying within this commonwealth, it shall be lawful for them to proceed in like manner, except that a copy need not be recorded in the county where the parties reside." (Vol. I. M. & B. Statutes of Kentucky, p. 441, omitted sections being same as act of 1792 at p. 434).

The Kentucky Court of Appeals, in *Womack & Wilson* v. *Hughes* (Littell's Sel. Cases, p. 294), held that this act required that the party should not only acknowledge, but subscribe the same in the presence of the justices, and that "the subscribing of the deed, being as positively required by the act as that of acknowledgment, we have no more authority to dispense with the one than the other." This language was applied directly to the deed of Charles Fleming to John and Wm. Bryan, dated August 8, 1794, but equally applies to the deed of Bryan and wife to Sackett, dated January 28, 1797, because the justices failed to certify that the grantors *subscribed* the same in their presence. *McConnell* v. *Brown*, Ibid. 459.

Further objection can be urged to the deed of Bryan and wife to Sackett, in this, that the act aforesaid (p. 435) re-

quired that the clerk of the county should certify on the original deed that the persons before whom such deed was acknowledged were justices of the peace, and that due faith and credit is to be given to any act done by them, when acting in their official character, a requirement not fulfilled by the certificate of Frelinghuysen, clerk of Somerset county. These deeds were not recorded within the time required by law, and were not entitled to admission to record at any time.

The foregoing, as will appear from the record, are all and the only deeds offered in evidence by the plaintiffs. There are others, however, appearing in the record of *Hughes* v. *Shore's Heirs*; but as this record was offered by plaintiffs, only, as corroborating proof in support of the competency of the several alleged deeds, as original papers, it does not devolve upon us the duty of showing the deeds to be incompetent evidence.

The plaintiffs were not entitled to read in evidence copies of alleged title papers appearing in said record; offering the same as they did to establish, simply, the collateral fact that the deeds claimed by them were in fact original papers, against the defendants who were strangers to the record, they could not use every thing found in the record as a medium of direct and affirmative proof in violation of well established principles of the law of evidence, and of orderly legal procedure. *Tappan* v. *Beardsley*, 10 Wall. Sup. Ct. 435.

However, we shall briefly note objections to their competency and relevancy as pointing the reasons why they were not offered independently of the record aforesaid. The deed of John and Wm. Bryan and wives to Samuel Sackett, dated May 1, 1795 (p. 72), is professedly but a copy from the Mason County Court, and is without a certificate of the clerk

or other proof that it was ever recorded, or, if recorded, that it was so done within the time allowed by law. As to the acknowledgment of John Bryan and wife, parties thereto, this deed is vulnerable to all the objections heretofore urged and shown to exist against the deed of Jan. 28, 1797, because the proof of acknowledgment is substantially the same, with the still more fatal objection that the clerk certifying as to the official character of the justices taking the acknowledgment fails to sign his certificate otherwise than "F——, clerk of Somerset."

The papers purporting to be copies of deeds of Carp & Tilford to Beebe (77); Beebe to Caldwell (80); Caldwell to Peter Mills (81); the two of Mills to Hughes (83 and 84), and of Beebe to Hughes, being part of the excluded record of *Hughes* v. *Shore's Heirs*, and not offered independently of it, for want of relevancy, are not specially noticed further.

The plaintiffs offered in evidence the report of Lowry and Waring, commissioners, to divide the 18,000 acre tract of Fleming, made upon the application of James Hughes (pp. 150 and 151), and also their deed to Hughes. And on page 154 is a deed of sheriff of Greenup county to Wm. McConnell, followed on pages 156 and 157 by deed of said Wm. McConnell by J. M. McConnell, attorney in fact, to James Hughes, and further by various deeds of the heirs of Howe to Campbell, Wilson Baird & Co., and to Wilson Culbertson & Co., copied in succession to page 170.

These alleged conveyances were offered by copies to support the competency of the deed offered as an original paper. Being in no wise connected with the alleged title of plaintiff's ancestor, they did not tend to elucidate any point at issue in this case, and were properly rejected as irrelevant and incompetent testimony.

Rice's Heirs v. *Lawan*, 2 Bibb (Ky.), 150.

Winlock v. *Hardy*, 4 Littell (Ky.), 270.
Winlock's Adm'r v. *Bowen*, 5 T. B. Mon. (Ky.) 34.

As before stated, the land plaintiffs seek to recover is the south-east end of Fleming's 18,000 acre grant. In the division of said 18,000 acres the commissioners allowed to Hughes 9,000 acres, being the north-west one-half, and it was this the sheriff of Greenup county sold and conveyed to McConnell, the execution under which he acted being levied only upon the interest of Hughes.

Now, the paper alleged to be the deed of Wm. McConnell, to whom the sheriff conveyed, was made by J. M. McConnell, styling himself as attorney in fact for said William. There is no attempt to show his authority in the premises, which must always appear to make out title by conveyance executed by attorney; recitals in the deed of the existence of the power not being sufficient evidence of the fact.

Roberts v. *Elliott*, 3 Mon. 397.
Herndon v. *Bascom*, 8 Dana, 113.

To make a deed executed by attorney operate as a recorded deed, the power of attorney must be recorded in the county where the deed is required by law to be recorded. *Taylor* v. *McDonald*, 2 Bibb, 420.

Therefore, this deed, as the foundation of Howe's title and the deeds subsequently made by the heirs of Howe, were not legally admissible, if otherwise competent and relevant.

III.

The final offer of evidence by the plaintiffs was a certified transcript from Mason Circuit Court (Ky.) of the proceedings in the case of Cary L. Clark against Joseph Conkling and others, which the court upon the objection of defend-

ants refused to permit to be given in evidence to the jury (pp. 185 to 200).

It is disclosed by this record, that in the year 1798, in the Washington District Court, in Mason county, Kentucky, Cary L. Clark exhibited a bill in chancery against Joseph Conkling, John and William Lloyd and others, heirs and representatives of Samuel P. Lloyd, deceased, the object of which was to foreclose a mortgage alleged to have been executed by Conkling & Lloyd to Samuel Sackett, the complainant alleging his right to a foreclosure under a pretended purchase from Samuel Sackett, and an assignment of Sackett by deed dated 1st July, 1797 (pp. 186–188).

The bill was filed on the third Wednesday in December, 1798. On the 13th day of June of said year the plaintiff issued out a writ of subpœna, on which the sheriff made return as follows:

"No inhabitant of this commonwealth."

Thereupon, the court, upon the motion of plaintiffs, ordered the defendants to appear and answer complainant's bill, and directed publication of the order against them as non-resident and absent defendants. (Order, June 20, 1798, pp. 185–6.)

At rules held in the clerk's office, in the year 1799, the bill was on motion of plaintiffs taken *pro confesso*, and at March rules the cause was set for hearing "at the next court" (p. 188).

Next in the order of this record appears an order made 24th November, 1798, reciting non-appearance and non-residency of defendants, and directing an alias order of publication to be made against them.

In June following (such is the confusion of dates) the bill was again taken as confessed, and an interlocutory de-

cree taken for the payment of the money alleged to be due from the defendants (p. 189).

Then at February term, 1800, a decree of sale was given, and commissioners appointed to make sale of the Lloyd interest in the land described in the mortgage referred to. The said commissioners made report in July, 1802, that they had executed the decree of sale, and that Cary L. Clark became the purchaser at the price of $300; but as to the date of said sale their report is silent. Thereupon final decree was entered barring defendants of and from all equity of redemption in the lands sold; and further, that complainant recover of them the sum of £1,062.12, and the costs of suit, subject to credit of $300, for which the land sold.

And so the record closes without approval or confirmation of the report, or order for deed to be made by commissioners or otherwise, or showing that a deed was made.

The defendants in error contend here, as in the court below, that the record aforesaid, and all proceedings therein certified, are void; because:

1. The court in which said proceedings were had did not possess and have authority of law to hear and determine the subject-matter of said action of *Clark* v. *Conkling* and others, nor actions of the class to which it belonged, and,

2. The record exhibits no proof of the publication of notice, as required by the laws of Kentucky, in force at the time, as a prerequisite of jurisdiction in all proceedings against absent defendants.

As to jurisdiction of the Washington District Court.

"The power to hear and determine a cause is jurisdiction. If the law confers the power to render a judgment or decree, then the court has jurisdiction." *Crignon's Lessee* v. *Astor*, 2 How. 338.

In *Dunn* v. *McMillen*, 1 Bibb, 409, the Kentucky Court of Appeals says: "The recent establishment of our courts precludes the idea of their deriving any portion of their authority from the common law or from immemorial usage or prescription. It is only from a just exposition of the laws instituting the courts and delegating to them their powers that we can learn the true extent and limits of the jurisdiction they possess."

The action of the complainant in the record under consideration was against non-resident and absent defendants, and, in order to test the jurisdiction of the court in the premises, we must examine the statute of Kentucky in force at the time and regulating such proceedings.

The act is that of 1796, Vol. I Morehead & Brown's Statutes, 91, 94, and is directory of the method of proceeding in courts of equity against absent debtors or other absent defendants. It is evident that Clark's suit was brought and attempted to be maintained under the fourth section of this act. As we read and understand the first section, it authorized proceedings against absent defendants only in cases where debts were due them or their effects were in the hands of some one resident of Kentucky, and was restricted in this application to choses in action and other personal property. The second and third sections refer alone to the methods of procedure in cases authorized by the first. The fourth section, in like manner, was restricted in its application to personalty, and is to be construed as regulating proceedings on attachments against absconding debtors.

Persuasive evidence in favor of such construction is found in the history of legislative enactments following the act of '96. The act of 1800 (p. 94) authorized a resident joint tenant to sue for an adjustment of any claim to land held in joint tenancy. The act of 1802 (p. 95) was to permit

a suit in chancery to obtain a division of lands against absent and unknown heirs. The act of 1815 (p. 97) enlarged the application of the act of 1802, but not until 1827 (see act, p. 98) was there any law of Kentucky by which the real estate of absent defendants could be subjected to sale for their debts. (Act so construed in *Hare's Heirs* v. *Bryant's Adm.*, 7 J. J. Marsh. Reports, p. 375.)

If the action of Clark had been to reach debts due the defendants or personal property belonging to them in the hands of others, then the jurisdiction of the court would be unquestionable; but his action was to enforce a demand against the defendants, and to subject real estate to its payment.

It seems not an unreasonable affirmation that title to land situated in Kentucky can be passed from one person to another, whether by alienation or judicial sale, only in the mode prescribed by the statutes of the state. If this be true the statute must confer jurisdiction upon the court to adjudge or decree the sale; otherwise it has not jurisdiction.

Land is held and alienated according to the law of the place where it is situated, and can not be held or appropriated otherwise than according to the will of the local sovereign, or the *lex loci rei sitae*.

Sneed v. *Ewing*, 5 J. J. Marsh. 465.
United States v. *Crosby*, 7 Cranch, 115.
Clark v. *Graham*, 6 Wheaton, 579.
Story's Conflict of Laws, §§ 18, 301, 365, 444.
Alexander v. *Waller*, 6 Bush, 338.

Washburn on Real Property, Vol. 3, top page 208, says:

"There are several modes and forms of divesting the title of one owner of lands, and creating a title to the same in another, which derive their force and effect from statute

provisions, whereby conveyances are made by some officer of the law to effect certain purposes, where the owner is either unable or unwilling to execute deeds to pass the title. Among these are levies or sales to satisfy execution creditors, *sales by order or decree* of a *Court of Chancery*," etc.

"A state may therefore regulate the manner and circumstances under which property, whether real or personal, or in action within it, shall be held, transmitted, bequeathed, transferred, or enforced; . . . and the remedies and modes of administering justice in all cases calling for the interposition of its tribunals to protect, and vindicate, and secure the wholesome agency of its own laws within its own dominions."

Section 18 Story's Conflict of Laws, cited and approved in *Hoyt* v. *Sprague*, 13 Otto, 630.

"It is a universal principle of sovereignty, as inviolable as it is fundamental and conservative, that the right to hold land, *and the mode of acquiring title to land* must depend altogether on the local law of the territorial sovereign." *Lathrop* v. *The Com. Bank*, 8 Dana, 120.

Holding, as we do, that, as the law of Kentucky did not confer jurisdiction upon any court of the commonwealth to hear and determine the particular class of actions to which the action of *Clark* v. *Conkling et al.* belonged, and that jurisdiction could not otherwise exist or be exercised, the action of the court below in excluding the record as void was justified for this as a primary reason.

But, should this not be agreed to, an objection fatal to this record arises under the second proposition of our argument:

That the record is void because the facts essential to the exercise of the jurisdiction do not appear therein.

Section 2 (act of 1796, Vol. I., p. 92 M. & B. Statutes) precribes that the court shall appoint some day in the next succeeding term for the absent defendant, or defendants, to enter his or their appearance and give security for performing the decree; a copy of which is directed to be forthwith published in the Kentucky Gazette or Herald, and continued for two months successively, and further shall also be published on some Sunday, immediately after divine service, in such meeting house as the court shall direct; and another copy shall be posted at the front door of the court-house. Failing to appear and give security authorized the court to take such proof as the complainant should offer; and if thereupon satisfied, to order the bill taken as confessed and decree further, etc.

In terms the orders (pp. 186 and 188) conform to the statutory requirement aforesaid.

The record produced contains no evidence of the fact of publication, not so much as reciting formally the existence of jurisdictional facts The entire proceeding, it appears, was wholly *ex parte*.

As in *Galpin* v. *Page*, (18 Wall. 350), presumption of service ordinarily arising from the existence of a judgment can not be raised in favor of this record, because:

1. The record shows affirmatively that the defendants were without the jurisdiction of the court.

2. The record proves affirmatively an attempted constructive service.

Neither the person nor the property of one not within the limits of the sovereignty can be affected or in any way bound except in strict conformity to the law of such sover-

eignty made in reference to and for the purpose of conferring such jurisdiction. *Hart* v. *Grigsby*, 14 Bush, 333.

Under the act of 1796 the Kentucky Court of Appeals decided that nothing short of substantial compliance with every prerequisite will give the court jurisdiction of the property sought to be subjected, and that the record must show upon its face that its requirements have been complied with.

Green's Heirs v. *Breckenridge*, 4 Mon. 546.

Blight's Heirs v. *Banks*, 6 Mon. 205.

Compliance was construed in *Green's Heirs* v. *Breckenridge* to require orders against absent defendants to be proclaimed in the church, and posted at the court-house door before appearance day and that proof thereof should also appear in the cause. An order of publication against absent defendants must be published two calendar months; a publication of eight weeks will not do. 1 Litt. 158; 4 Litt. 17, 283.

In Kentucky orders of warning have taken the place of orders of publication under the old practice since the adoption of the code in 1854; but the courts have uniformly adhered to the rulings and practice under the former, holding that the record must show upon its face that the code provisions have been complied with, or the judgment must be treated as in operative and void.

Brownfield v. *Dyer, etc.*, 7 Bush, 507.

Long v. *Montgomery*, 6 Bush, 394.

Grigsby v. *Barr*, 14 Bush, 333.

Merchell v. *Bond*, 2 Bush, 615.

That the record must show proof of service appears from many cases; for, as said by this court (18 Wall. 369):

"Such has been the ruling, we believe, of the courts of every state in the Union."

However high the authority to whom a special statutory power is delegated, we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with. This rule applies equally to an order of the Lord Chancellor as to any order of petty sessions. *Christy* v. *Union*, 3 Perry & Davidson, 208.

This court, in *Galpin* v. *Page*, 18 Wall. 372, says: "The record in the consolidated action shows that she (the defendant) was beyond the reach of the process of the court. All presumption of jurisdiction over her person by the District Court, which otherwise might have been indulged, is thus repelled, and it remains for the defendant to show that by the means provided by statute such jurisdiction was obtained. The statute provides, in case of absent or non-resident defendants, for constructive service of process by publication. It requires an order of the court or judge before such publication can be made; it designates the facts which must exist to authorize the order, the manner in which such facts must be made to appear, the period for which publication must be had, and the mode in which the publication must be established. These provisions, as already stated, must be strictly pursued, for the statute is in derogation of the common law. And the order, which is the sole authority for the publication, and which by statute must prescribe the period and designate the paper in which the publication is to be made, should appear in the record with proof of compliance with its directions, unless its absence is supplied by proper averment."

The statute of California, so before the court, is similar as to some of its provisions to the statute of Kentucky upon

the same subject, except that it does not direct the additional publication by proclamation at church, and by posting copy of order at court-house door, and the authority of this case is conclusive against the validity of the record offered by the plaintiffs.

The want of jurisdiction in the Washington District Court the defendants had the right to show *collaterally*, as the plaintiffs were seeking and claiming rights and benefits under the proceedings there had.

Latham v. *Edgerton*, 9 Cow. 227.
Barnes v. *Harris*, 3 Barb. 608.
Putnam v. *Wendell*, 3 Wend. 205.

We respectfully submit that the action of the court excluding this record as evidence before the jury was right, and that there was no error in the rejection of the several alleged title papers offered by the plaintiffs, and that upon the whole case the judgment of the Circuit Court should be *affirmed*. We therefore respectfully pray an affirmance.

ED. F. DULIN, and
JOHN F. HAGER,
Attorneys for Defendants in Error.

117-225

Office Supreme Court U. S.
FILED.
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Supreme Court of the United States.

KATE APPLEGATE *et al.*,

vs.

THE LEXINGTON AND CARTER COUNTY MINING COMPANY *et al.*

Rejoinder of Plaintiffs in Error to Brief for Defendants.

D. W. ARMSTRONG, Attorney.

1. "*The other paper*," which the attorneys for defendants make the first point of consideration in their brief (page 4), is not, for the purposes of this hearing, any part of this record. It is in no way referred to in the Bill of Exceptions. In point of fact, it is a mere assignment to Sackett of the covenants in *præsenti*, the personal covenants, contained in the deed to John Bryan from Fleming's trustees. This assignment was intended to apply to such covenants of the deed in question as did not "run with the land," such, for instance, as the covenant of seizin, and the proper and customary method of giving vendees the benefit of covenants of that nature, was by *express* and independent assignment. This paper has no possible bearing on the *legal* title as involved in this action in ejectment, and whether it was admitted or rejected by the Court below, or not offered there, would be alike wholly immaterial, and

without effect on the rights of the defendants. The record, however, as before said, contains no evidence that this paper was offered below, and its discussion by counsel is therefore gratuitous; but if its connection with the deed from Fleming's trustees to John Bryan is such as to afford a presumption that it was in fact offered, then, from the silence of the record, also arises the presumption that, if incompetent, it was rejected by the Court, and as the plaintiffs are not complaining of that rejection, and have not assigned it for error, that is the end of discussion.

2. The grounds of objection urged by the defendants to the certified copy of the deed from Fleming's trustees to John Bryan, are stated with an elusiveness that is highly perplexing. The following extracts, from the brief of the attorneys for defendants, appear to embody the principal points on which they rely in this regard:

(*a.*) "*Were it conceded that originally these papers were properly authenticated so as to authorize the clerk to admit them to record, yet, presented as they were, nearly twenty years after execution, the clerk was then without authority to admit them to record*" (p. 5).

(*b.*) "*The certificate of the Mayor of Richmond to deed of Fleming et al. to Bryan is open to the further objection, that he does not certify an acknowledgment by Charles Marshall, who is principal in the conveyance, but, simply, that it was acknowledged by 'William Marshall, attorney in fact for Charles Marshall;' and naming him as an attorney in fact in the certificate cannot be considered more than a description of person in a court of law.*

"*Nor is the deed good as to Charles Marshall's title, because no power of attorney is exhibited, appointing the said William Marshall attorney, and authorizing him to make such conveyance* (§ 2, Act 1702, Vol. I. M. & B. Statutes).

"*In consideration of all this, manifestly, the Court could*

not do otherwise than reject these papers as evidence to show title out of Fleming's trustees" (p. 8).

(*c*.) "*The Act of* 1831 *can be of no avail to plaintiffs in avoiding the force and fatality of the objections urged against these papers; for this statute only applies where the proof of acknowledgment and certificate conformed to the requirements of the law in force when these acts were performed*" (p. 9).

These propositions are inconsequent to a degree rarely encountered. In future treatises on "*The Elements of Logic*," they would be admirably instructive to the juvenile mind, as substitutes for the time-worn examples of *non sequitur*.

The first proposition (*a*) is rendered wholly irrelevant, and, indeed, trivial by the Act of 1831. The very state of case to which that act is addressed relates to deeds which, in the absence of the act, "the clerk was without authority to admit to record." And this deed now in question is clearly the case, in the language of the act, of "*a deed that has been recorded, but not within the time prescribed by law*," and the provision of the act is that, "where any such deed has been recorded, but not within the time prescribed by law, copies of the record of the deed shall and may be used as evidence in the same manner as if it had been recorded within the proper time."

The hypothetical concession made by counsel in the statement above quoted, in regard to this deed's having been "originally properly authenticated, so as to authorize the clerk to admit it to record," might as well have been candidly made in the unconditional form, for there is not the smallest foundation for any contrary suggestion in connection with it. It is true, the Circuit Court in *Hughes* vs. *Shores* say, "the certificate and seal of the Mayor is not sufficient to authorize it to be read," but the Court of Appeals, in the language quoted from *Womack* vs. *Hughes*, at page 6

of the brief for plaintiffs, explicitly declares that: "This authentication conforms essentially to the Virginia Act of 1785, and to our Act of 1796, which follows the Act of Virginia, and entitles the deed to be recorded here."

When to this is added the opinion in *McCulloch* vs. *Myers* (page 6 of plaintiff's brief), further discussion of this question would seem impossible.

The suggestions made by the learned counsel of the defendants in the extract (*b*) above, are entirely without point or application. *The deed was properly signed and executed*, that is to say, it was *signed:* "Charles Marshall, by William Marshall, his attorney in fact," and the *recital in the certificate* of the Mayor that it was *acknowledged* by "William Marshall, as attorney in fact for Charles Marshall," could be readily shown, when taken in connection with the form of *signature* to the deed, "Charles Marshall, by William Marshall, his attorney in fact," to be invulnerable under even the most rigid technical tests.

And so, also, the objection that no power of attorney from Charles Marshall to William Marshall is exhibited, could easily be demonstrated to be groundless. If the execution of the deed otherwise were sufficiently proved, the execution of the power to William Marshall as attorney for Charles Marshall, would, after the great time that has elapsed, be presumed. To cite authority on this proposition, however, would be a benighted proceeding, for the reason that this question, *as to the connection of the Marshalls with this deed*, is altogether trivial and impertinent.

The entire legal title to the property was in Fleming and passed to the trustees under his will. Their conveyance was just as valid and effectual to pass the legal title without Marshall's uniting, as with him; though it was proper enough that he, as a beneficiary, should become a party to the deed for the purpose of evidencing his acquiescence in the transfer of the property. The

technical sufficiency of the deed as to Marshall is, therefore, not of the least consequence. And it is most extraordinary that counsel should conclude their argument on these alleged defects in the execution of the deed as to *Marshall*, with this sentence:

"In consideration of all this, manifestly, the Court could not do otherwise than reject these papers as evidence to show title out of Fleming's trustees."

What, in the name of reason, have the absence of the *Marshall* power of attorney and the defects in the *Marshall* acknowledgment to do with "showing title out of Fleming's trustees." No defect as to Marshall, however gross, nor any number of such defects, could possibly affect the validity of the deed as to "*Fleming's trustees*," and we think it not unfair to counsel to infer that they attempt in this conclusion to covertly shift the application of these alleged defects to "Fleming's trustees," because of the perception that it would be altogether too preposterous a conclusion to speak of the papers as insufficient to "show title out of Marshall," who had never been vested with a shadow of title, although, the assumption that *Marshall* did have title which it was necessary for Bryan to acquire, was insisted upon up to the very conclusion, when we find the words "Fleming's trustees," as a manifest substitute for Marshall.

As to the proposition (*c*) above, the defendants have suggested no particular, save that implied in their reference to the ruling of the Circuit Court in *Hughes* vs. *Shores*, in which the certificate and acknowledgment of this deed, so far as its execution by Fleming's trustees is concerned, fail to "conform to the requirements of the law in force when these acts were performed." On the other hand, as already shown, *Womack* vs. *Hughes*, and *McCullock* vs. *Myers*, establish the complete conformity of this acknowledgment and certificate, "to the requirements of the

law in force when the acts were performed." Wherefore, this deed is brought within the provisions of the Act of 1831, and for the error of the lower Court in rejecting this certified copy, the judgment must be reversed.

3. The next proposition insisted upon by defendants is this:

"*Mere antiquity of a deed is not sufficient to entitle it to be read as evidence; nor can the record of a suit against one not a party, be received as corroborating proof of its* (sic) *execution.*"

We assume, for purposes of argument, that the "corroborating proof," mentioned in the proposition, has reference to the "execution" of the deed, and not to the "execution" of the "record of a suit."

As to the first clause of this proposition, it is, beyond all controversy, the law. The second clause, if it were ever so sound in the abstract, has no application to the matter in hand; but it is not good law.

On the contrary, no proposition of law is less open to question than that the records of suits, and judgments and decrees, when offered as corroborative proof of the execution of deeds, that is to say, when offered as muniments of title, are admissible in evidence against the world.

Barr vs. *Gratz*, 4 *Wheat.*, 220.

And again, is it equally true and unquestioned that such records are admissible against third parties, when introduced by way of inducement or to prove a collateral fact.

1 *Greenleaf*, § 527.

But the plaintiffs introduced the record of *Hughes* vs. *Shores* more directly under the latter of these principles, than for the purpose of affording "corroborating proof of the execution" of the deed, in any

strict sense of the term. The *direct* bearing of this record was confined to the question as to whether this original deed was produced from a proper place of custody, and plaintiffs introduced the record simply to prove the "collateral fact" that *Hughes* vs. *Shores* was a litigation in regard to a portion of the lands conveyed by the deed. That being true, we argued that among the papers of such a case was a place where the deed "might reasonably be expected to be found."

The brief of the defendants contains the explicit statement, repeated four or five times over, that "this record was offered in support of the competency of this deed," that is to say, in proof of a collateral fact, and yet they seek to exclude it by invoking as law the unique proposition that "the record of a suit cannot be received, against one not a party, as corroborative proof of its execution."

4. The defendants seem to maintain that it was necessary for plaintiffs to show, otherwise than has been done, that this deed was "a part of the record" in *Hughes* vs. *Shores*. The law of ancient documents, however, contains no requirement that a paper must be "a part of the record" in order to render it admissible. The requirement, in this behalf, is that such papers shall be brought from "a place of proper custody," and it is by no means indispensable in establishing the proposition that a given place is a "place of proper custody," to further show the papers in question to have been "part of a record." A technical inquiry, such as was involved in the cases cited by defendants, as to whether a paper is, in a strict legal sense, and for such purposes as were under consideration in those cases, "a part of a record," is a widely different thing from an inquiry as to the mere physical fact of the presence of papers in a particular place, and the attendant investigation as to whether such place was one where the papers "might, if genuine, be reasonably expected to be

found." The first is purely a question of conformity to technical rules; the second is as broad as the truth. Such technical conformity would, undoubtedly, in many cases, tend strongly to establish the second proposition, but, in many other cases, the technical conformity might exist where the second proposition would wholly fail.

But while getting up this quibble as to whether these deeds were "a part of the record," counsel make a concession of tenfold more weight and significance, than the matter they question could possibly possess. They say: "It is true that in a list of papers *filed* by James Hughes, it is stated that with other papers was *found* an original deed * * *. This list is but a private memorandum of Hughes." The word "*found*," in the above quotation, is an interpolation of defendants' counsel. The "list" says nothing about an original deed being "*found*." It says that the papers enumerated were "*filed*" by James Hughes.

The cloud thrown over the matter, the confusion in which it is involved, by the insertion of the word "found" in this statement of counsel, preclude the idea of inadvertance, and establish a design in the interpolation. But the effect of the concession thus unwittingly made remains. If "the papers were filed by Hughes," and such is the concession, and if this "list" is the "private memorandum of Hughes," made by him more than sixty years ago, the custody of the deed is demonstrated, in the words of the Hill & Cowen note, to have been "with a party entitled to hold it, if it were genuine," and bringing it from the papers of *Hughes* vs. *Shores* is the equivalent of producing it from the custody of Hughes himself.

5. The suggestion, on page 11 of defendants' brief, as to the incompetency of the evidence in regard to the possession by James Howe and the deeds and settlements under him, has already been sufficiently met at pages

8–13 of our original brief. In view of the facts of this record, the assertion by counsel that "the title and claim of Howe was not in the least connected with alleged title of plaintiffs," is one that we confess our inability to understand. To say that chains of title that start from a common source, that are evidenced by deeds that mutually recognize and recite the execution and existence the one of the other, and that find their severance in proceedings in partition, are not "the least connected," is, indeed, a surprising statement.

6. Again, on page 11 of their brief, defendants' counsel say:

> "There is no proof that it was an original deed; the bill of exceptions says, only, the plaintiffs *claimed* it to be the original * * * * * It is manifest that the paper offered was a copy * * * * * *."

Now, it is not true, that "the bill of exceptions says, *only*, the plaintiffs *claimed* it to be the original." The bill of exceptions variously speaks of the paper, as "the original deed," "the paper purporting to be the original deed," and "the paper claimed by the plaintiffs to be the original deed." But, of course, in an inquiry of this nature, the mere formal recital of the bill of exceptions, in order to identify the paper, is immaterial in fixing its character.

At the moment when counsel penned the words: "It is manifest that the paper was a copy," they had *manifestly* forgotten that the parchment, offered as the original deed, had been sent to this Court for inspection, and was part of this record. The man who could look at that parchment, and for a moment doubt that it was an *original* paper, is in a state of universal skepticism, more than pyrrhonic.

In truth, the only question that need concern either Court or counsel, is that of the proper authentication of this undeniably *original* paper.

7. It is amply conceded in our brief that the certified copies of the deeds from John Bryan and wife to Samuel Sackett, and from Charles Fleming to John and William Bryan, are inadmissible, their offer below having been purely formal, and we therefore need not dwell upon the portions of defendants' brief devoted to the discussion of those points.

8. The statement on page 9 of defendants' brief, that the Court below excluded the evidence, which is there recapitulated, in support of the competency of the original deed from Fleming's trustees to Bryan, is an entire mistake. The record of *Hughes* vs. *Shores* (Pr. rec., 63); the evidence of the possession, sales and settlements by and under Howe; the chain of title, from the partition between Hughes and Clark, down through the Sheriff, Howe &c., were all admitted. The recital of the bill of exceptions is that this evidence was "introduced" (Pr. rec., 170), and of course evidence that was "introduced" was not excluded. The evidence excluded was that which was "offered," and that relates simply to the parol testimony with regard to the deed's being of record in the Clerk's office of the Court of Appeals. Except for considerations of accuracy, however, this point is of no consequence, because the evidence in question was clearly competent, and, if it is to be treated as having been excluded, it only adds another to the errors of the lower Court, and we ask that the plaintiffs' assignment of errors be extended accordingly. In point of truth, however, the assignment of errors heretofore made, covers every ruling of the lower Court by which evidence offered by the plaintiffs was excluded.

9. The copies of the deeds among the papers of *Hughes* vs. *Shores* are simply a part of the record of that case, and admissible as such, for the purpose of defining and explaining the subject-matter of that action, and not

otherwise. Proof of title could not be made, and was not attempted to be made, by such means. The present hearing is mostly a discussion as to the admissibility of certain of these very deeds, when offered as copies under the formal statutory certificates as prescribed, and as originals, and certainly the presence of these informal copies, as exhibits, among the papers of *Hughes* vs. *Shores* did not affect the admissibility of that record, for the *collateral* purpose for which it was introduced, or work the slightest prejudice to the rights of the defendants.

10. It was not necessary for the plaintiffs to produce the power of attorney from William McConnell to J. M. McConnell. (Defendants' brief, p. 17.) The plaintiffs' *claim* nothing under that deed, and it was therefore not incumbent on them to show its validity or sufficiency. The deed was equally as admissible and effectual, without the power of attorney as with it, for the purpose of showing the nature of Howe's claim and possession, its connection with these original deeds, and the various consequences attached to it, as heretofore explained. It was the *claim* and possession, the partition, the sales, settlements and conveyances, connecting themselves with these original deeds, that were *material*, and not the technical sufficiency or validity of the *title* under which all this was done. The proposition is elementary in the law of ejectment.

11. Only one other proposition advanced by defendant's counsel requires to be noticed. That proposition concerns the offer of the record in *Clark* vs. *Conkling*, and is as follows:

> "The Court, in which said proceedings were had, did not possess and have authority of law to hear and determine the subject-matter of said action of *Clark* vs. *Conkling* and others, nor actions of the class to which it belonged." (Defendant's brief, p. 19.)

It is contended, in support of this position:

1. "That the fourth section of the Act of 1796, was restricted in its application to *personalty*, and is to be construed as regulating proceedings on attachments against absconding debtors."
2. "That not until the Act of 1827, was there any law of Kentucky, by which the real estate of absent defendants could be subjected to sale for their debts."

Undeniably, as to the *first section* of the Act of 1796, which is the only section of that act concerned with attachments against absent debtors, its application is limited to "their debts and effects in the hands of the defendants, within this commonwealth," and these may, if you please, be denominated "personalty."

The equivalent of this construction of this first section, as now urged by the defendants, has been already earnestly insisted upon in the brief for plaintiffs. Equally true is, it that until the Act of 1827 there was no provision in the law of Kentucky for an *attachment or other equivalent proceedings*, against the real estate of a non-resident defendant. (Counsel for defendants, although citing the Act of 1827, do not comply with the rule of this Court, by printing the same, but its material provisions will be found appended hereto.) The principle has had the recognition of this Court in many cases, that "the jurisdiction of the Court to at all inquire into and determine the obligations of a non-resident debtor, not actually served with process, is only incidental to its jurisdiction over the property." And the property must, in the first instance, and before judgment, "be brought under the control of the Court by attachment, or some other equivalent act."

Pennoyer *vs.* Neff, 5 Otto, 734.
Boswell *vs.* Otis, 9 How., 336.
Webster *vs.* Reid, 11 How., 437.

This is the real meaning of *Hare* vs. *Bryant*, 7 J. J. M., 375, which, by a misapprehension fairly startling, the defendants seek to apply to an action for the foreclosure of a mortgage. As there had not, until the Act of 1827, been any provision in Kentucky for any ancillary remedy, "attachment or equivalent act," by which, in a general action for debt, the real estate of the absent defendant could "be brought under the control of the Court," in advance of judgment, therefore, *Hare* vs. *Bryant* says, just as *Pennoyer* vs. *Neff*, and the cases in 9 and 11 Howard above cited say, that of such actions the Courts could have no jurisdiction. The Act of 1827 supplied this defect in Kentucky, it furnished an ancillary remedy, through a *lis pendens* created by filing a bill in Chancery, that was "the equivalent," for this purpose, of an attachment. But how fatuous to suggest that a statute, creating a remedy of this kind, has any reference to the jurisdiction for the foreclosure of mortgages.

The jurisdiction for the foreclosure of mortgages is complete and sufficient, under any grant of power that merely authorizes the filing of suits for that purpose, as the property is thereby, by the very nature of the case, "brought under the control of the Court."

The "ancillary remedy," whether "attachment or some equivalent act," exists only under *express and special* statutory creation, and is in its nature distinct from, and independent of, the grant of jurisdiction as such.

The Act of 1796 being sufficient to authorize the filing of bills for the foreclosure of mortgages, the Court was thereby vested with all the power and jurisdiction necessary for the purpose of a complete and binding decree in *Clark* vs. *Conkling*. There being, however, no provision in the law of Kentucky for bringing the real estate of an absent defendant under the control of the Court in a general action for debt, the Courts were

without jurisdiction in such cases as *Hare* vs. *Bryant*, until the passage of the Act of 1827.

The scope of the Act of 1796 is clearly set forth in *Watts* vs. *Griffin*, Litt. Sel. Cas., 246, and for the convenience of the Court, we quote at length from that opinion.

"That the case made out in the bill is properly cognizable in a Court of Equity, we apprehend, cannot be seriously doubted. The power of the Court over such a case, may be readily perceived by adverting to the provisions of the statute of this country regulating attachments in chancery and proceedings against absent defendants. That statute was admitted in argument to confer upon the Court of Chancery jurisdiction in cases which would otherwise be properly cognizable at law; but it was contended it should not be construed to embrace the case of a defendant residing in another country, or to confer upon the Court of Chancery power to hear and decide any other description of case than a claim for a debt owing by the absentee.

"The fallacy of the argument will, however, be readily perceived by adverting to the several statutes of Virginia from which that of this country was taken. The first was an act of 1748 regulating proceedings in the general Court, and is general in its provisions as to all suits against defendants who may be without the country; and the second is a statute of 1777, establishing a High Court of Chancery, and contains provisions substantially the same as those of the statute of 1748. The expressions employed in each of these statutes are not only sufficient to embrace the case of defendants residing in another country; but, by adverting to the preamble of the Act of 1748, it will be perceived that the case of such defendants was within the actual contemplation of the Legislature, and must have been intended to be provided for by the law makers.

"There is certainly more room to doubt whether these statutes should not be construed to apply exclusively to debts owing by the absent defendants; for although the expressions employed in the enacting part of those statutes seem to convey a more general import, there might be a propriety in con-

fining their operation to cases within the contemplation of the Legislature; and from the preamble of the statute of 1748, the Legislature seem only to have had in view the case of debts owing by absent defendants.

"It was, however, to remove the doubts which arose under this branch of those statutes, that a subsequent act was passed by the Virginia Legislature of 1787—that statute, after reciting that doubts had arisen whether the provisions of the law, as it then stood, applied to any other cases than those of absent debtors, declares that the same proceedings which might be had against absent debtors, may be had in *all cases whatever, for any matter or thing whatever*, in chancery, against absent defendants.

"It was obviously intended by this statute to remove the doubts which then existed as to the just import of the statutes which had been previously enacted, and to extend the jurisdiction of Courts of Chancery beyond that description of cases to which existing doubts had confined it. It was, therefore, intended to confer on the Courts of Chancery jurisdiction over other cases than debt, and the statute must be so construed as to effectuate that intent.

"Whether since the enactment of this latter statute, the nature of the demand can form any restriction on the power of the Court of Chancery to proceed against absent defendants, it is not now necessary to inquire; for, be that as it may, we have no hesitation in sustaining the jurisdiction in all cases of contract. Whatever may be the description of the contract, whether for the payment of property, or an undertaking for its soundness, there existed the same necessity for providing a remedy, where it could not be obtained in the ordinary course of law, as existed in the case of a contract for the payment of a specific debt; and as it was evidently intended to authorize a proceeding in chancery in other cases than for the recovery of a debt, there can be no principle on which its operation can be confined to any particular species of contract."

The word "County," in the third line of the Act of 1796, page 71, of plaintiff's brief, is a misprint for "country." It was the quaint usage in early times, both with the Kentucky Courts and Legislature, to employ

the word "country" in the sense of "State." Kentucky was always "this country," and beyond her borders was "out of this country."

We ask the indulgence of the Court for one further brief citation, on the general questions connected with the admissibility of the record of Clark *vs.* Conkling. The case from which we quote is *Grignon* vs. *Astor*, 2 *How.*, 319, as follows:

"This is a familiar principle in ordinary adversary actions, in which it is presumed, after verdict, that the plaintiff has proved *every fact* which is indispensable to his recovery, though no evidence appears on the record to show it; and the principle is of more universal application in proceedings *in rem*, after a final decree by a Court of competent jurisdiction over the subject."

If the brief of plaintiffs, with this rejoinder, appears to have been swollen to an undue volume, we trust it will not be overlooked that it has been much extended by copious extracts from the authorities.

DAVID W. ARMSTRONG,
Attorney for Plaintiffs.

Act of 1827.

In force from its passage.

An Act *to amend the laws in relation to absent defendants. Approved Jan.* 25, 1827.

§ 1. That from and after the passsge of this act, it shall and may be lawful for any creditor of a non-resident owner of lands in this commonwealth, to file a bill in chancery in the Circuit Court of the county where the land or some part thereof may lie (which bill shall be sworn to), setting forth the debt or demand, and that the same has not been paid, and that the defendant or defendants are non-residents and own no personal property, or not enough to pay and discharge the aforesaid debt or demand, in this State, within the knowledge of the complainant or complainants; and upon said Courts being satisfied of the justice of the demand, it shall and may decree the same, and order the sale of any lands in this State belonging to the said defendant or defendants, or so much thereof as will satisfy and discharge the said claim or demand aforesaid; and in such cases it shall not be required that process should be served on the defendant or defendants, when they are all non-residents.

§ 4. That the provisions of the third section of an act passed December 19, 1796, concerning absent defendants, and also the proviso to the fourth section of said act, shall apply to all cases arising under the provisions of this act as fully and completely as though they were hereby re-enacted; provided, that the complainants show themselves to be entitled to a decree for at least fifty dollars."